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GENERAL COUNSEL'S EXHIBIT NO. 2

Greensboro, North Carolina
June 8, 1953

Mr. W. B. Truitt, President
Truitt Manufacturing Company
1016 Battleground Avenue
Greensboro, North Carolina

Dear Sir:

This is to advise you that Shopmen's Local Union No. 729 desires to re-open the contract for wage negotiations as outlined in Section 27 of the existing agreement between your company and the Local Union.

Very truly yours,

SHOPMEN'S LOCAL UNION No. 729

C. E. REYNOLDS, *President*
/s/ C. E. REYNOLDS

C. H. CANTER, *Recording Secy.*
/s/ C. H. CANTER

GENERAL COUNSEL'S EXHIBIT NO. 3

P. O. Box 2141
Greensboro, North Carolina
September 2, 1953

Truitt Manufacturing Company,
Attention of Mr. W. B. Truitt, Sr., President,
1016 Battleground Avenue,
Greensboro, North Carolina.

Dear Sir:

Please be advised that Shopmen's Local Union No. 729, of the International Association of Bridge, Structural and

Ornamental Iron Workers, A.F.L., having entered into negotiations with your Company on August 4, 1953, for the purpose of bargaining collectively for a wage increase, as provided for under Section 27 of the present existing agreement between the aforementioned parties, has rejected your proposal of two and one-half ($.02½) cents per hour increase in the belief your Company can meet the Union's request of ten (.10c) per hour general increase.

Representatives for the Truitt Mfg. Company have claimed, during our lengthy negotiations, the inability to grant an increase in excess of two and one-half (.02½c) cents per hour, therefore Shopmen's Local Union No. 729 respectfully requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal and/or counter proposals of a wage increase in excess of two and one-half (.02½c) cents per hour.

The forementioned request is made with a desire to bring about an early conclusion, and request a prompt reply.

Very truly yours,

By .....
Special Representative

in behalf of Shopmen's Local Union No. 729 of the Int'l. Assn. of Bridge, Structural and Ornamental Iron Workers, A.F.L.

Registered. Return receipt requested.

GENERAL COUNSEL'S EXHIBIT NO. 4

DOUGLAS, DOUGLAS & RAVENEL
Attorneys at Law
Greensboro, N. C.

September 4, 1953

Mr. Julian F. Head
Special Representative
Shopmen's Local 789
P. O. Box 2141
Greensboro, North Carolina

Dear Mr. Head:

Truitt Manufacturing Company has received your letter of September 2nd, asking that all financial data, tax records, etc., of the Truitt Mfg. Co. be opened to the Union in order that the Union might determine whether the Company is in a financial position to pay what you refer to as "the Union's request of 10 cents per hour general increase.

I have been authorized to state to you that the Company takes the position that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union. The Company's position throughout the recent negotiations and in previous sessions with you and the Union, has been that the question of granting a wage increase concerns our competitive bidding for jobs to keep the plant operating.

We have endeavored to point out to you that the average wage of Truitt Manufacturing Co. is already higher than the average wage of all our competitors in this area. We have stated many, many times that in bidding for contract work, our bids must be made on the basis of what the labor will cost to perform these jobs and that we simply cannot get the work if our labor costs used in our estimates are higher than those of our competitors. The Union committee has presistently ignored our comparative rates, has made

no answer to our exhibits of how we compare with our competitors, and has continued to ask for higher pay, on the grounds that the employees need it, and that we are under the general average of the "Industry", which you apparently define as being all steel plants in the United States.

We will be glad at any time to show your our books and records regarding the wages we pay to our employees whom you represent, although we think you have this information already.

Very truly yours,

/a/ R. D. Douglas, Jr.
Attorney for Truitt Manufacturing Co.

RDDJr; ld

GENERAL COUNSEL'S EXHIBIT NO. 5

September 14, 1953

P. O. Box 2141, Greensboro, N. C.
Mr. R. D. Douglas, Jr.
Attorney for Truitt Manufacturing Co.
Greensboro, North Carolina

Dear Mr. Douglas:

We have for acknowledgement your letter of September 4, 1953, in reply to our letter of September 2, 1953, addressed to the Truitt Manufacturing Company.

In our letter we pointed out that representatives of the Truitt Manufacturing Company, during lengthy negotiations, claimed the Company was financially unable to grant a general wage increase of ten cents (10c) per hour as proposed by the Union and we requested that the Company submit its financial records to substantiate its position.

In your letter of September 4th, you say that you have been authorized to state that the Company takes the position that confidential financial information concerning the Company's affairs is not a matter of bargaining or discussion with the Union. You also state that the Company has advised the Union's Committee that their present rates are higher than certain of its competitors. In addition, you offer to show the Company's record regarding wages that are now being paid the Company's employees.

Please be advised that the Union's Committee is not unmindful of the fact that the metal fabricating industry is highly competitive. The Union's Committee has also taken into consideration a statement made by the Company's representatives to the effect that some of its competitors are presently paying wage rates as low or lower than the Company is paying its employees.

It is the opinion of the Union's Committee that other of the Company's competitors are paying wages rates higher than those presently being paid by the Company and that these competitors are still operating and obtaining contracts on a profitable basis. The Union does not contend that the financial affairs of the Company are subject to collective bargaining. It does contend, however, that the Company should submit full and complete information with respect to its financial standing and profits during the past few years in order that the Committee, as well as the other members of the Union employed by the Company, can intelligently decide whether or not they should continue to press their request for a general increase of ten cents (10c) per hour. Such financial information is pertinent to collective bargaining. Failure on the part of the Company to furnish such information has the effect of erecting an insurmountable barrier to a successful conclusion of the bargaining.

We respectfully call to your attention a decision of the National Labor Relations Board in the matter of Southern Saddlery Company and Local No. 109, United Leather

Workers International Union (AFL) Case No. 10-CA-636, July 21, 1950 (90-N. L. R. B. No. 176), (26 LRRM 1322).

If the Company still contends that it cannot afford to grant the wage increase of ten cents (10c) per hour requested by the Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including bonafied evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs.

Very truly yours,

By .....

Special Representative
in behalf of Shopmen's Local Union No. 729 of the International Association of Bridge, Structural & Ornamental Iron Workers, A.F.L.

REGISTERED—Return Receipt Requested

GENERAL COUNSEL'S EXHIBIT NO. 7

DOUGLAS, DOUGLAS & REVENEL
Attorneys at Law
Greensboro, N. C.

September 29, 1953

Mr. Julian F. Head,
Shopmen's Local 729,
P. O. Box 2141,
Greensboro, North Carolina

Dear Mr. Head:

I have your letter of September 14th and also your letter of September 28th. In both of these letters, you request

that the Union be furnished with "full and complete information and evidence of its financial status, including bona fide evidence as to dividends paid by the company during the past ten years and the breakdown of its manufacturing costs."

I have read very carefully your letter of September 14th. I am familiar with the NLRB decision in the Southern Saddlery case. The facts in this care are entirely different from the facts in the Truitt-Local 729 negotiations. We have at no time refused to negotiate with you concerning the wages and we are ready to meet with you or your committee at any time.

I think it is unnecessary for me to repeat that our refusal to grant your demanded wage increase was based primarily on what such a raise would do to our competitive position in the industry in this area. The Truitt Company is willing to discuss with you at any time the problem of how our wages compare with those of our competition. However, the company repeats that the financial status of the company and the information which you have requested in both of your recent letters and a former one, is not pertinent to this discussion and the company declines to give you such information; You have no legal right to such.

I also wish to call your attention to another matter. It is my recollection that at our last negotiation session, you were asking for an increase of 5 cents per hour. Your recent letters refer to a 10 cts. an hour increase. I do not know whether this is a mistake in transcribing your letters, or whether you have intentionally increased your demand, after we put into effect the 2½ cts. per hour raise which the company offered.

Very truly yours,
/s/ R. D. Douglas, Jr.

RDDJr; ld

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JULIAN F. HEAD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Goldman) Mr. Head, what is your occupation? A. Special Representative for the International.

Q. The International of which the charging Union in this case is a Local? A. Yes.

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Q. (By Mr. Goldman) Mr. Head, when did the Shop Committee and yourself first meet with Representatives of Truitt Manufacturing Company on this Wage Issue? A. August 4th.

Q. And what was the issue between the Company and the Union at that time? A. Well, the men were requesting a wage increase.

Q. And what was the discussion between you, the Union rather and the Company at the time of that meeting? A. As well as I remember, the Company stated that they were paying as much or more, paying more, than any of their competitors and they offered us 2½ cents an hour increase, and said that that would be all that would be able to give at this time.

Q. All right, now, what did the Union request in the way of a wage increase? A. Well, Mr. Douglas was acting at the meeting, as spokesman for the Company and he asked us what did we have in mind, and I told him that the men were wanting 10 cents or better or 10 cents at the minimum.

Q. And what was the Company's response to that demand? A. Well, they said that would be almost impossible to do, they stood firm on their position, that since they were paying as much or paying more than competitiors, that if they would give more than their offer, well, it would put them out of business or put them out of competition of getting business with

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other competitors.

Q. All right, now, was there a further meeting with or between other representatives of the Truitt Manufacturing Company and representatives of the Union? A. Yes, sir, I think we met again about August 7th.

Q. All right? A. I told the Company that the men had turned the 2½ cents down for they felt like they should have more, and the Company took the same position that day as they did in the first meeting.

Q. At any time after that August 7th. meeting, did the employees of the Truitt Manufacturing Company go out on strike? A. Yes, sir, they went out on strike August 10th. and stayed out a week in support of their request for a substantial wage increase.

Q. All right, was there a meeting of the parties during the strike? A. Yes, sir, we met on August 12th.

Q. All right, and what was the discussion there? A. The Officials of the Company there was still, remained at— 2½ cents was all that they could give.

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Q. (By Mr. Goldman) Mr. Head, at the time of this correspondence was there any bargaining negotiations between Truitt Mfg. Company and the local? A. Not during that time.

Q. Now, when were the meetings between the Company

and the Union resumed? A. I think we got back together around November the 24th.

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Q. All right; now, I show you General Counsel's Exhibit 8-A marked for identification, and ask you to tell us what occurred at the meeting of November the 24th? A. Well, Mr. Douglas was speaking for the Company, he kind of reviewed the past negotiations and then he went into the, went on to say that the Company had just completed the yearly audit and there was several things that the Auditors had found wrong and had made suggestions in ways to cut overhead cost, and he named that some of the office procedure was wrong and some changes in the shop that should be made, and he stated that the Company found that profit in regard to sales and cost was low, and that the labor cost was high, and the Company was struggling under a financial strain, being under capitalized, and they had just negotiated a loan from a Bank to buy new equipment and to buy an additional lot at the back of the plant there that was needed, and that they had been trying to get for sometime; and as to the wage increase, he said it would have to remain the same or would remain "no" if we had to have answer "yes" or

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"no" and he suggested that we continue negotiations later in order to give the Company time to make these changes and see just what the picture would be later on; although, he said he was not going to promise us anything except that probably they would in one way or the other know whether the Company could give any increase; that would, they would know better at a later date possibly in January, early January, just what the position the Company would be in or what the outlook might be.

Q. All right, now, was there anything shown to you by Truitt Manufacturing Company at this November 24th. meeting to show that the profit in regard to sales and cost was low? A. No, sir, nothing exeept the statement by Mr. Douglas.

Q. When was the next meeting between Truitt Manufacturing Company and the Union negotiators? A. We met again on January 13th.

Q. All right, I hand you General Counsel's Exhibit 8-B, which has been previously identified? A. Well, Mr. Douglas then kind of reviewed the past meeting, the meeting of November the 24th, and he informed us that the changes suggested by the Auditor had been made, but the National out-look seemed predominant in his thinking; he went ahead then—The newspapers at that time were playing up a bad business year out-look, and he went into that, stating about the Automobile Industry and the Steel Industry in general, it seems to set the pattern for the whole National Picture, and then he

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quoted several jobs that the Company had been unsuccessful in their bids about the State, and I think quoted two or three TVA Jobs they had been unsuccessful on and Mr. Truitt, Sr. said somehow another they just could not seem to estimate the jobs with the other shops for they seem always to come out on the big end of the horn, or some body could always bid lower; and in spite of that, they said they were going to go out on a limb and offer us an additional two and a half cents increase at that time on a 90 day conditional basis.

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A. Prior to this meeting though I gave Wallace Truitt and Mr. Douglas a copy of the supplemental agreement and asked

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them to consider it in our next meeting and so we met again in January 28th; I told the Company that the

men felt like they had not made any definite offer, since they wanted to put it on a 90 day conditional basis, that if at the end of 90 days the Company could take it away, then the men felt like they was not being offered anything, and they wanted proof if the Company was not making money, then they wanted proof to substantiate that claim.

Q. Who did you say wanted proof to substantiate that claim? A. The men in the shop wanted proof, because they said if the Company was not making money, then they wanted to help them make money.

Q. All right, now, did the Company agree to the Company's request to show proof? A. No, sir.

Q. That it was not making money? A. No, sir, Mr. Douglas said that although the Union had requested the Company's records to substantiate the Company's proof that the Company felt like we didn't have any legal right to such proof or the records of the Company to substantiate that claim, so we then went into a general discussion of the business conditions and reasons or ways to improve conditions if the Company was not making money, we wanted to know how; Mr. Douglas stated that they didn't think we could get anywhere along that line of discussion; and I told him, "well, we are

facing a problem there that we had to work it out somehow or another, if the Company were not making money, then the men wanted to make the Company money, because the Company was not paying as high wages as they were elsewhere, and the men were simply wanting to make more money themselves and likewise in making more money they would make the Company money.

Q. All right, now, was there a further meeting between Truitt Manufacturing Company Representatives and the Representatives of the Union; and hand you General Counsel's Exhibit 8-D for identification? A. Yes, sir, we met again on February 10th.

Q. All right? A. Mr. Douglas went into the charges pending before the Board concerning the wage increase

request, and he still maintained that we didn't have no legal right to the increase, and he told me that the Company had took another look at their bids or their work schedules and several of the people had withdrawn their plans for jobs and the general picture didn't look good at all, and in the face of that the Company was withdrawing the offer of 2½ cents.

Q. All right, now, did Mr. Douglas say at that time what Truitt Manufacturing Company's position had been in past negotiations? A. Yes, sir, he, well, he kinda, reviewed the situation of what we had talked about, the Company's position to give more

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money would put them out of the competitive picture, they would be unable to get any jobs; and I told him that the men still felt like if the Company was not making money they wanted to know why, and it was hard for the men to see or understand the overhead and all that stuff, if the Company was not making money, then they wanted to know, wanted to be shown some proof.

Q. All right, now, I show you General Counsel's Exhibit 4, previously introduced in evidence, and I direct your attention to the sentence: "The Union Committee has made no answer to our Exhibits of how we compare with our competitors". Now, I will ask you if during the course of any meeting with the Truitt Manufacturing Company they ever showed you any Exhibits as to how they compared with their competitors? A. No, sir, they never did show any exhibits, they merely quoted—

Q. Did the Company at any time show you any books, records or documents? A. No, sir.

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CROSS EXAMINATION

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Q. I believe your language was that the Company stood firm on its position that they were already paying more than their competitors, is that correct? A. Yes, sir, they stood firm on that, with the explanation there that if they gave more then it would put them in a position

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where they would not be able to get jobs.

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Q. Now, Mr. Head, there is one thing that has not come out yet. Immediately after the strike, the Company did put into effect

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a two and a half cents an hour raise, did it not? A. Yes, across the board.

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Q. Now, Mr. Head, you have stated on Direct Examination on about five occasions, referring to five or six different meetings, that the Company's position was that it was already paying more than its competitors in the area. You folks brought out at some time or another, wages paid in Cleveland and Akron and Birmingham and other places a good distance from North Carolina, didn't you?

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A. Not all those places. I believe our position was there that you were in competition with firms in those areas, in the Ohio, West Virginia, Tennessee areas. I believe that is the way we had that.

Q. However, you did refer to the fact that our wages were not higher than those places, didn't you? A. Yes, you gave us what you wanted, and then we told you

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that you were also in competition with those other companies.

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Q. (By Mr. Douglas) Mr. Head, I repeat my question, that when you wrote this letter of September 2nd, for "such books, records, financial data, etc." did you have in mind, or were you asking that a C.P.A. be allowed to inspect the Company's books completely and take what he thought was pertinent, or, were you asking for the Company to select what it thought was pertinent and furnish that to your C.P.A.? Is my question plain, Julian, as to what I am interested in knowing? A. Yes, sir, I am trying to think. I think the Company should, or we wanted the Company to furnish proof by records, or anything relating to their claim of being unable of giving any more increase.

Q. Now, Mr. Head, that was the answer to a question you gave a moment ago. My present question concerns whether or not you were asking permission to have your C.P.A have access to the

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books and select this pertinent data you have just mentioned, or whether you were asking for the Company to select the data to substantiate its position and furnish that data to you. A. Well, the only way I know to answer that, Dick, is that we were wanting anything re-

lating to the Company's position, any records or what have you, books, accounting sheets, cost expenditures, what not, anything to back the Company's position that they were unable to give any more money. I think all that should be laid before an Accountant.

(Trial Examiner) Now, he asked you whose Accountant. Can you answer that? Your Accountant, or an Accountant supplied by the Company.

(The Witness) Well, we never did discuss any of that, simply because the Company said it was none of our business, and we had not discussed anything along that line, whose or who or what.

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Q. (By Mr. Douglas) Mr. Head, in view of your just having stated that you were asking in these letters for full and complete information and everything in the financial data, if it were necessary, to substantiate the Company's position; since you have explained you wanted everything to substantiate the Company's position, I am asking you, if, from start to finish, you have not understood that the Company's position was that it

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could not raise wages because it would price itself out of competitive bidding. A. Well, there was a statement, Dick, I believe along in conjunction with the negotiations, during the negotiations there was a statement made, well, not only these negotiations, but I believe you will agree with me that Mr. Truitt, St., said that the Company had never paid dividends, been undercapitalized, they didn't have working capital, and to grant more than the two and a half cents at this time would simply put them out of business.

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HENRY D. COLE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Goldman) Mr. Cole, where do you work? A. Truitt Manufacturing Company.

Q. Are you a member of the Negotiating Committee of the Local Union at Truitt Manufacturing Company? A. Yes, sir.

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Q. All right, now, do you recall the time when Mr. Head was putting forward the question of wage increase and stated the Union expected to get a wage increase of at least ten cents? A. Yes, sir.

Q. All right, what was the response of the Company's spokesman, at the time that statement was made? A. Well, Mr. Truitt raised up then and said "it would break the Company up to give up that much pay raise, and it would put them in a precarious position."

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REDIRECT EXAMINATION

Q. (By Mr. Goldman) Do you know which one of the

meetings before the strike that this statement was made at? A. It was on August 4th.

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GEORGE F. BECK

a witness being called by and on behalf of the General Counsel,

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being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Goldman) Mr. Beck, where do you work? A. Truitt Manufacturing Company.

Q. And are you a member of the Negotiating Committee of the Local Union? A. I am.

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Q. I direct your attention to a bargaining negotiating meeting occurring after the strike of August 10th to 17th, and I will ask you what was the response of the Company Negotiators at the time when the Union was asking for an increase? A. We were still asking for an increase greater than two and a half cents per hour, and the Company said then that they could not afford to pay over two and a half cents per hour, and they were talking about the other Companies at this time and they said that they just could not afford it, that they had been losing money on jobs and said, "take for instance, The Bethlehem

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Steel, said they could not compete with them, the big boys, they said.

Q. What was the reason given for their statement they

could not compete with the big boys? A. They claimed we were asking for too much money, too much per hour rates.

Q. All right, now, what was the comparison between Bethlehem Steel and Truitt Manufacturing Company at this point, and who made it, by the way? A. It was made by Mr. W. B. Truitt.

Q. All right. A. And he said that Truitt could not compete with Companies like that, said Bethlehem Steel, said they were an old Company, and they had the Capital and said "we are just a young Company, and we don't have the Capital, the working Capital, and it would break us up."

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CROSS EXAMINATION

Q. (By Mr. Douglas) Mr. Beck, you made the statement just now the Company said they could not afford to pay over two

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and a half. Who said that? A. Each and every one of Management that was present, including the spokesman, Mr. Douglas.

Q. Did I say the Company could not afford to pay over two and a half? A. Over two and a half, yes, sir.

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Q. Did Mr. Wallace Truitt say the Company could not afford to pay over two and a half cents? A. Yes, sir.

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Q. Now, was that the end of each of those statements, or did we say something to the effect that we could not afford

to pay over two and a half cents and retain our competitive position in business? A. Well, you tried to give a reason whenever you said you could not pay over two and a half cents, you tried to give a reason then why you could not.

Q. Well, what was that reason that we gave, Mr. Beck?

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A. Well, competitive business was one.

Q. Yes. A. And then we just couldn't afford to give over two and a half cents.

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(Mr. Goldman) Will Counsel for Respondent stipulate with me that W. B. Truitt is President of Truitt Manufacturing Company?

(Mr. Douglas) We will stipulate to that effect, yes, sir.

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JOHN W. SANDLIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Goldman) Where do you work, Mr. Sandlin? A. Truitt Manufacturing Company.

Q. Are you a member of the Negotiating Committee of the Local Union at Truitt's? A. Yes, sir.

Q. Were you present at the bargaining conferences between Truitt Manufacturing Company and the Local Union through the summer of 1953 and winter of 1954? A. Yes, sir.

Q. All right, directing your attention to a bargaining conference occurring in January of this year, I will ask you if you recall a time when the Company Representatives left the room in the course of the bargaining conference? A. Yes, sir, the Company, they were trying to get the ninety day stipulation in there with the two and a half cents; we didn't want the ninety days, and we also wanted that two and a half to apply to the minimum rates, and the Company left the room debating on that; whenever Mr. Douglas came back in first, I mean they were talking about what they had agreed on and they had not agreed on to apply it to the minimum rate; and Mr. Head said that we would have to have something more than old man

Truitt's word was not enough to go on, we had to have something else.

Q. You had to have more than old man Truitt's word for what, Mr. Sandlin? A. That the Company could not afford to pay any more than two and a half cents, that they were undercapitalized.

Q. To whom was this statement of Mr. Head's made? A. Mr. Douglas.

Q. And did Mr. Douglas make any reply? A. Yes, sir, he said that they could not go along with that argument, he didn't think that they could go along with that.

Q. All right, did there come a time when the rest of the management Committee came back into the Negotiating room? A. Yes, sir, Mr. Douglas left, and the rest of the Company, they all returned into the room where we were negotiating.

Q. All right. A. And the argument proceeded over the

two and a half cents and the ninety days; I asked Mr. Truitt, I said at the end of ninety days, you can either take it away or leave it there at the end of the ninety days, I said "now, what proof are we going to have to put before these men, provided you do take it away, what proof are we going to have that the Company is in that financial difficulty that they can't pay it; and Mr. Truitt put in and said; "John, that just goes to show that you don't believe a word I have said."

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Q. All right, now, did you make any statement at the time you said you would like to have proof at the end of ninety days in case the Company retracted its two and a half cents offer, did you say any reason why you wanted the proof? A. Yes, sir, I just stated that the reason why I wanted the proof was that the men were going to ask us at the end of the ninety days and they do withdraw the two and a half cents, they were going to want to know why.

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JOHN R. TRUITT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Douglas) Mr. Truitt, what is your position with the Truitt Manufacturing Company? A. Vice-President in charge of sales.

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Q. (By Mr. Douglas) Mr. Truitt, I believe I asked you if any meeting was held by the Company Officers to formulate and state the Company's official position, and if so, who was present and what was determined?

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A. All of the Officers were present, and you, Mr. Douglas, of course; and at that time we have very careful consideration of our competitive position; we decided that as a response to this appeal for a wage reopening on the part of the Union to flatly state our position in the matter, which was that two and a half cents per hour increase; and that was formulated by the Officers of the Company, and you were instructed to tell the Union to that effect at that first meeting.

Q. Now, Mr. Truitt, did you, through me or anyone else, did the Company, through me, point out to the Union this position which you have just mentioned? A. Absolutely.

Q. Did the Company offer any substantiation of its position with regard to its competitors? A. There was not too much concrete evidence presented at that particular time, but it was very definitely emphasized that that was as far as we could possibly go from the competitive angle.

Q. Did the Company at any time discuss with the Union, if so, tell about the discussion, the rates of its competitors? A. Yes, sir; that, of course, came at a subsequent meeting, it was not at the first meeting, it was at a subsequent meeting, I don't recall exactly, it must have been the second or third meeting.

Q. Did the Company, through its spokesman, have any documents or lists of any kind with regard to its competitor's wage rates?

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A. Yes, sir, we did.

Q. Were they communicated to the Union? A. Yes, they were.

Q. Was any request made by the Union for those documents? A. No.

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CROSS EXAMINATION

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Q. But you don't dispute that the Union did say that it was the Union's opinion that other of the Companies competitors were paying wages higher than you were paying and they were still able to operate on a profitable basis?

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A. Yes.

Q. Not that that contention is correct, but that it is the contention the Union made in answer to your contention. A. I believe I remember hearing that statement being made, yes.

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WALLACE B. TRUITT

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Douglas) Mr. Truitt, what is your position

with the Company? A. I am another one of those Vice-Presidents, and I am the Purchasing Agent.

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Q. Now, one more question, Mr. Truitt. Did you hear your father say, on any occasion, the statement attributed to him something to the effect that that would break the Company up? A. If I recall, in one of the sessions fairly late in the afternoon, and as you know, my father, he is diabetic, and insulin slips up on him and he gets very nervous and temperamental, and I don't know the exact words, but maybe after discussing this wage thing at length for several hours, he might have, I can't repeat his words, but he might have said in sort of a heated way, being upset as he gets, and nervous, "well, boys, if we give it to you, we might go broke."

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CROSS EXAMINATION

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(Mr. Goldman) Let me ask you this; would Counsel stipulate as to the relationship between Mr. Truitt, who is presently testifying, and W. B. Truitt.

(Mr. Douglas) W. B. Truitt is the father of all the other Officers of the Company.

(Mr. Goldman) General Counsel joins in that stipulation.

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Q. And did you attempt to show in any other manner

the margin of profit which the Company had made on the past bids upon which it had been successful? A. We did not, but we could have.

Q. You could have? A. Yes.

Q. You have such information? A. I mean our records would show us; we have a cost sheet on every record we have.

Q. You do have manufacturing costs? A. We do.

Q. And you have manufacturing cost sheets which would show

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the manufacturing cost? A. We do.

Q. And the sum total of those cost sheets, plus the amount received for the job done during the year, or minus the amounts received for the jobs done during the year, make up the income of the Corporation; isn't that right? A. That is the only way except on minor commissions and stuff like that.

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Q. And a short time before you brought those bid sheets into the bargaining conference, you had offered a ninety day two and a half cents provisional raise, isn't that right? A. Yes, sir.

Q. And after the complaint was issued in this matter, you withdrew that offer, isn't that right? A. We withdrew the offer.

Q. On February 10th? A. Yes.

Q. And you also gave this year a Christmas bonus larger than that which you had ever given in the past three or four years?

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A. You asked had we paid a Christmas bonus larger than the last—

Q. Two or three years? A. If I remember, I can quote figures if you want me to, but this year we gave a forty hour week pay; year before we gave just a flat I think it was $10.00 a man; and I believe the year before that it was the same; several, many years ago, we gave three times what we gave this year.

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Before: JOHN C. FISCHER, Trial Examiner

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a charge filed by Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A.F.L., a labor organization herein referred to as the Union, the General Counsel of the National Labor Relations Board[1] by the Regional Director for the Eleventh Region, Winston-Salem, North Carolina, on January 30, 1954, issued a complaint against Truitt Manufacturing Company, herein referred to as the Respondent or the Company, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charge complaint, notice of hearing were served upon the other parties to the proceeding.

With respect to unfair labor practices, the Complaint alleges in substance that from on or about September 2, 1953, the Respondent refused, and at all times thereafter has continued to refuse, to bargain with the Union as the

[1] The term General Counsel as used herein, includes the attorney representing the General Counsel at the hearing, and the National Labor Relations Board is referred to as the Board.

exclusive representative of all of its employees in an appropriate unit, and that since July 27, 1953, the Respondent has refused to grant the wage increases requested by the Union on the ground that it was financially unable to grant such increases. The Respondent, in its answer, admits certain jurisdictional allegations and the

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appropriateness of the unit as alleged in the complaint, but denies the commission of any unfair labor practices, and affirmatively pleads to certain allegations in the complaint. During the hearing, the complaint was amended by stipulation between counsel for Respondent and counsel for General Counsel that on or about July 27, 1953, and at all times thereafter the Respondent refused to grant the wage increases requested by the Union.

Pursuant to notice a hearing was held in Greensboro, North Carolina, on March 16, 1954, before the undersigned Trial Examiner. The General Counsel and the Respondent were represented by counsel and the Union by its representatives. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. The parties were given opportunity to present oral argument before the Trial Examiner and also to file briefs and proposed findings of fact and conclusions of law. Both counsel made oral arguments. A brief has been received from counsel for the Respondent and has been duly considered. On April 8, 1954, General Counsel moved that the Trial Examiner order that the transcript be corrected in certain particulars involving minor typographical errors. There being no objection such corrections are hereby ordered to be accomplished in the official tanscript.

Upon the record in the case, and upon observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

The Respondent is a North Carolina corporation maintaining its principal office of business at Greensboro, North Carolina engaged in the manufacture and sale of plate work, structural steel and miscellaneous iron work. During the past calendar year, which is representative of all times material herein, Respondent manufactured and sold finished products valued in excess of $1,500,000, more than 50 percent of which, in value, was sold and shipped to customers outside the State of North Carolina. During the same period, the Respondent purchased raw materials, supplies, and equipment valued in excess of $750,000, more than 75 percent of which, in value, originated outside the State of North Carolina and was shipped in interstate commerce to the Greensboro plant. Respondent concedes, and I find that it has been and is engaged in commerce within the meaning of the Act.

II. The labor organization involved

Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A.F.L., is a labor organization within the meaning of the Act.

III. The unfair labor practices

A. *The bargaining negotiations*

1. The appropriate unit; representation by the Union of a majority in the appropriate unit

It is admitted in the pleadings that all production and maintenance employees at the Greensboro plant, including checkers, truck drivers, and leader men, but excluding all guards, watchmen, the head shipping clerk and shop clerk, office clerical, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Sec-

tion 9 (b) of the Act, as amended. It was further stipulated that at all times here relevant the Union represented a majority of the employees in the above appropriate unit.

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2. The alleged refusal to bargain

a. *The background—the correspondence*

On October 27, 1950, in an election by secret ballot, conducted under the supervision of the Regional Director of the Fifth Region of the National Labor Relations Board a majority of the employees in the unit selected the Union under Section 9 (a) of the Act as their representative for the purposes of collective bargaining. By letter dated June 8, 1953, the Union requested the reopening of the union contract for wage negotiations. These negotiations began on August 4, and on September 2 the Union wrote the Company that it had rejected a proposal of two and one-half cents (.02½) per hour increase stating: "in the belief your Company can meet the Union's request of ten (10 cents) per hour general increase . . . respectfully requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal and/or counter proposals of a wage increase in excess of two and one-half cents (.02½) per hour."

On September 4, 1953, R. D. Douglas, Jr., attorney for the Company replied as follows:

> Truitt Manufacturing Company has received your letter of September 2nd, asking that all financial date, tax records, etc., of the Truitt Mfg. Co. be opened to the Union in order that the Union might determine whether the Company is in a financial position to pay what you refer to as "the Union's request of 10 cents per hour general increase."
>
> I have been authorized to state to you that the Com-

pany takes the positions that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union. The Company's position throughout the recent negotiations and in previous sessions with you and the Union, has been that the question of granting a wage increase concerns our competitive bidding for jobs to keep the plant operating.

We have endeavored to point out to you that the average wage of Truitt Manufacturing Co. is already higher than the average wage of all our competitors in this area. We have stated many, many times that in bidding for contract work, our bids must be made on the basis of what the labor will cost to perform these jobs and that we simply cannot get the work if our labor costs used in our estimates are higher than those of our competitors. The Union committee has persistently ignored our comparative rates; has made no answer to our exhibits of how we compare with our competitors, and has continued to ask for higher pay, on the grounds that the employees need it, and that we are under the general average of the "Industry," which you apparently define as being all steel plants in the United States.

We will be glad at any time to show you our books and records regarding the wages we pay to our employees whom you represent, although we think you have this information already.

The Union, on September 14, replied to this letter as follows:

We have for acknowledgement your letter of September 4, 1953, in reply to our letter of September 2, 1953, addressed to the Truitt Manufacturing Company.

In our letter we pointed out that representatives of the Truitt Manufacturing Company, during lengthy negotiations, claimed the Company was financially unable to grant a general

wage increase of ten (10 cents) per hour as proposed by the Union and we requested that the Company submit its financial records to substantiate its position.

In your letter of September 4th, you say that you have been authorized to state that the Company takes the position that confidential financial information concerning the Company's affairs is not a matter of bargaining or discussion with the Union. You also state that the Company has advised the Union's Committee that their present rates are higher than certain of its competitors. In addition, you offer to show the Company's record regarding wages that are now being paid the Company's employees.

Please be advised that the Union's Committee is not unmindful of the fact that the metal fabricating industry is highly competitive. The Union's Committee has also taken into consideration a statement made by the Company's representatives to the effect that some of its competitors are presently paying wage rates as low or lower than the Company is paying its employees.

It is the opinion of the Union's Committee that other of the Company's competitors are paying wage rates higher than those presently being paid by the Company and that these competitors are still operating and obtaining contracts on a profitable basis. The Union does not contend that the financial affairs of the Company are subject to collective bargaining. It does contend, however, that the Company should submit full and complete information with respect to its financial standing and profits during the past few years in order that the Committee, as well as the other members of the Union employed by the Company, can intelligently decide whether or not they should continue to press their request for a general increase of ten (10 cents) per hour. Such financial information is pertinent to collective bargaining. Failure on the part of the Com-

pany to furnish such information has the effect or erecting an insurmountable barrier to a successful conclusion of the bargaining.

We respectfully call to your attention a decision of the National Labor Relations Board in the matter of Southern Saddlery Company and Local No. 109, United Leather Workers International Union (AFL) Case No. 10-CA-636, July 21, 1950 (90 N.L.R.B. No. 176), (26 LRRM 1322).

If the Company still contends that in cannot afford to grant the wage increase of ten (10 cents) per hour requested by the Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including bonafide evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs.

On September 28, the Union again wrote to the Company's counsel Douglas requesting favorable and prompt consideration of this letter of September 14, and received the following answer:

I have your letter of September 14th and also your letter of September 28th. In both of these letters, you request that the Union be furnished with "full and complete information and evidence of its financial status, including bonafide evidence as to dividends paid by the company during the past ten years and the breakdown of its manufacturing costs."

I have read very carefully your letter of September 14th, I am familiar with the NLRB decision in the Southern Saddlery

case. The facts in this case are entirely different from the facts in the Truitt-Local 729 negotiations; we have at no time refused to negotiate with you concerning the

wages and we are ready to meet with you or your committee at any time.

I think it is unnecessary for me to repeat that our refusal to grant your demanded wage increase was based primarily on what such a raise would do to our competitive position in the industry in this area. The Truitt Company is willing to discuss with you at any time the problem of how our wages compare with those of our competition. However, the company repeats that the financial status of the company and the information which you have requested in both of your recent letters and a former one, is not pertinent to this discussion and the company declines to give you such information. You have no legal right to such.

I also wish to call your attention to another matter. It is my recollection that at our last negotiation session, you were asking for an increase of 5 cents per hour. Your recent letters refer to a 10 cents an hour increase. I do not know whether this is a mistake in transcribing your letters, or whether you have intentionally increased your demand, after we put into effect the 2½ cents per hour raise which the company offered.

b. *The strike*

As recited, negotiations began on August 4 and at that meeting the Company offered 2½ cents an hour increase, stating that that would be all it would be able to give at that time and remain in a competitive position. The next meeting was on August 7 when union representative Head advised the Company that the men had turned down this increase. As a result of this impasse a strike occurred on August 10, when the men stayed out a week in support of their demand for a wage increase. The next meeting was held, during the strike, on August 12, but the Company remained firm in its offer of a 2½ cents per hour increase, and the men returned to work 5 days later.

c. The Respondents contentions

Answering the allegations contained in the complaint, the Respondent admits that on or about September 2, 1953, the Union requested the Respondent to furnish the Union with books, records, and financial data, but it is specifically denied that such information was demanded for the purpose of substantiating the Respondent's position that it was financially unable to grant the Union's request for wage increases, as the Respondent had not denied wage increases on such grounds.

In his brief Respondent counsel Douglas contends that "an employer can refuse a demanded wage increase on the grounds that *such increase would put him out of a competitive position* with other employers in the same business, *without being required to disclose his financial books and records to* the representative of the employees." Counsel concedes that there is considerable law to the effect that a refusal to grant increases because of inability to pay, carries with it the duty to prove such inability if proof is requested. He argues: "But Respondent contends that refusal on competitive grounds, while admittedly injecting an economic factor into bargaining, has never been held by the Board or any Court, to require disclosure of all financial records. If this were the law, then all friendly bargaining would cease. No employer would dare explain how increased labor costs would make him price his product out of the market; how competitors would outsell him. For unless he stood ready to open all his confidential financial data to the Union, he could say nothing but "No" to wage demands, and could give no fair, honest reasons. Respondent points out that the competitive approach to the question of wage increases is discussed in nearly every collective bargaining

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session in the United States, and neither company nor union has ever dreamed that this would lead to disclosure of *all* financial data." (Italics supplied).

d. *General Counsel's contentions*

General Counsel contends that the Respondent violated Section 8 (a) (5) by failing to substantiate its position that it cannot grant increases requested by the Union because of business conditions. In this connection he cites the case of *N. L. R. B.* v. *Jacobs Manufacturing Company*, 94 NLRB 1214; 30 LRRM, 2098. This case holds that the Respondent upon refusing a union's request for a raise in wages on the grounds of business conditions must produce whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demand. This is required by Section 8 (a) (5) and the good faith requirement of Section 8 (d) is not satisfied, as the court said, by the bare assertion of a conclusion made upon facts undisclosed and unavailable to the Union, which was not acceptable without a presentation of sufficient underlying facts to show, at least that the conclusion was reached in good faith. The rule, counsel argued, requires whatever relevant information the Respondent has to indicate whether it can or cannot afford to comply with the Union's demand. Counsel cited that the court in that case went along with the rationale that the Board had enunciated in *Southern Saddlery, Co.*, 90 NLRB 1205, 26 LRRM 1322, in which the Board said that the validity of the Respondent's position in a case such as this depended upon the existence of facts peculiarly within its own knowledge, and the Respondent is required to furnish the Union with sufficient information to enable the latter to understand and discuss intelligently the issues raised by the Respondent in opposition to the Union's demands.

In course of refusing to grant the wage increases under discussion here, counsel charged that Respondent made a number of statements of position as to why it could not grant the wage increases requested by the Union, citing President Truitt in his statement that Respondent could not afford to grant the increase because it was under capitalized. He quoted Counsel Douglas as stating that the

margin of profit in regard to sales and costs is low and as also saying at the November bargaining meeting the Company simply could not get work if our labor costs used in our estimates are higher than those of our competitors. He contended that the Respondent steadfastly refused to give the Union, in spite of its repeated requests, any accounting of records that would substantiate its assertion. Counsel contended that it is an element of bad faith bargaining, and shows lack of give and take in bargaining negotiations for Respondent to have prolonged this wage reopening and refused to satisfy the union membership with the production of any relevant documents substantiating its contention that it is unable to grant any wage raises. He contended that the means of preventing 6 or 7 months of fruitless negotiations, lay within the hands of the Respondent to persuade the union membership that the Respondent couldn't afford to give the requested wage increase thus constituting bad faith bargaining.

e. *Two questions*

There are 2 questions involved in this case. The first is whether the Company pleaded financial inability as the reason for rejecting the Union's wage demand and having done so may be required to produce his books and records as contended by General Counsel; and the second is whether an employer can refuse a demanded wage increase on the grounds that such increase would put him out of a 'competitive position,' and then substantiate this plea by demonstrating that he was paying the going area wage scale as contended by Respondent.

Under the Act, both the Company, as the employer of the employees in the appropriate unit set forth above, and the Union, as the representative of those employees, were under a duty to bargain collectively with each other

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(Section 8(a) (5); 8(b) (3)). This obligation includes "the

performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." (Section 8 (d)).

f. *Testimony of General Counsel's witnesses*

Julian F. Head, special representative for the International Union, testified that he engaged in bargaining negotiations with Truitt Manufacturing Company on behalf of its employees after July 27, 1953. On August 1 the employee's shop committee, with himself as the representative, met with the Company to discuss a wage issue. He stated that Mr. Douglas, attorney for the Company, was acting as spokesman at the meeting and "asked us what did we have in mind and I told him that the men were wanting 10 cents or better or 10 cents at the minimum." In response to this, the Company, by Mr. Douglas stated that they were paying as much or more, as any of their competitors and they offered the Union 2½ cents an hour increase, saying that that would be all that they would be able to give at this time. He stated: "they said that that would be almost impossible to do, they stood firm on their position, that since they were paying as much or paying more than competitors, that if they would give more than their offer, well, it would put them out of business or put out of competition of getting business with other competitors." They met again on August 7: "I told the Company that the men had turned the 2½ cents down for they felt like they should have more, and the Company took the same position that day as they did in the first meeting." As a result the men went on strike on August 10 and stayed out a week in support of their request for a substantial wage increase. They met next

on August 12 and the officials of the Company again contended that 2½ cents was all it could give. It appears that no more meetings between the Company and the Union were held, nor any communications transmitted until a meeting of November 24, 1953.

Head identified General Counsel's Exhibit No. 3 as a letter written by him to the Company advising to the Company that the members had voted rejection of the Company's proposal of 2½ cents and reiterating their belief that the Company could pay 10 cents; Exhibit No. 4, a letter dated September 4, 1953, from R. D. Douglas to himself, which refused the Company's request to be shown books and records; Exhibit No. 5, a letter from the Union to Douglas which requested a reply to its letter of September 14; Exhibit No. 6, a letter of September 28 from Head to Douglas; and followed that with General Counsel's Exhibit No. 7, a letter from Douglas dated September 29, 1953. Head also identified General Counsel's proposed exhibit No. 8-A, a single yellow sheet of paper headed "Meeting November 24," as well as General Counsel's Exhibit 8-B, a yellow paper headed "January 13, 1953" and General Counsel's Exhibit 8-C, a single yellow sheet of paper headed "January 28, 1953," and also General Counsel's Exhibit 8-D, a single yellow sheet of paper headed "February 10."

In response to counsel's question Head stated that General Counsel's Exhibits 8-A through 8-D were notes which he took during the course of meetings with Truitt Manufacturing Company on the dates indicated. Counsel Douglas objected to the introduction of these exhibits stating that they appeared to be entirely self-serving notes taken by Mr. Head. He argued that in order to refresh his recollection under the Federal and State rules he could consult the notes but for him to offer as official

exhibits these notes which he had made, were not proper evidence.[2]

Head testified that Mr. Douglas was speaking for the Company in saying that the Company had just completed the yearly audit, that there were several things the auditors found wrong and had made suggestions in ways to cut overhead cost, that some of the office procedure was wrong, some of the changes in the shop should be made, that the Company found the profits in regard to sales and costs was low, that labor cost was high and the Company was struggling under a financial strain, being under capitalized and that they had just negotiated a loan from a bank to buy new equipment and to buy an additional lot at the back of the plant that was needed. Head stated that Douglas suggested

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[2] The record shows that Julian Head, testifying on behalf of the General Counsel, refreshed his recollection on the stand with notes identified by him as having been made by him during certain contract negotiations. The General Counsel offered these in evidence as Exhibits 8-A through 8-D and cited the standard North Carolina authority on the law of evidence, "North Carolina evidence by D. F. Stansbury." He referred to page 48 of this volume.

Page 48 says; "The witness may refresh his memory before the trial, in which case he need not produce in Court the writings used for that purpose. If the writings are in court, however, or the witness attempts to use them while testifying, the opposite party is entitled to their production for inspection. *The writing itself is not admissible in evidence.*" (Italics supplied)

The footnote to this statement cites 2 North Carolina cases, then says; "But see Carson vs. Blount 155 N.C. 103; 72 S.E. 90."

The Carson vs. Blount case allowed the introduction of several book entries of figures showing the prices the defendant had paid for cotton, which figures had just been testified to by a witness. The Court stated that these exact figures could be used to corroborate the witness.

The Respondent contends that Stansbury correctly states the North Carolina law and the Federal law on this matter when he says; "The writing itself is not admissible in evidence," and further contends that the Carson case, in allowing certain figures from an account book to be introduced, is not authority for allowing General Counsel Witness Head to introduce notes made by him during collective bargaining, not as to exact amounts or figures, but as to general statements alleged to have been made and his interpretation of the General statements. The Trial Examiner concurs in counsel Douglas interpretation and holds these exhibits inadmissible as evidence. (C. F. latest edition of Uniform Rules of Evidence approved by American Bar Association and American Law Institute Sec. VIII Hearsay Rule 63 para. 4, page 199).

that they continue negotiations later in order to give the Company time to make changes and see "just what the picture would be later on; although, he said he was not going to promise anything except that probably they would be in one way or another know whether the Company could give any increase; they would know better at a later date, possibly in January, early January, just what the position of the Company would be in or what the outlook might be."

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He testified that the next meeting was on January 13 at which time "Mr. Douglas then kind of reviewed the past meeting, the meeting of November 24, and he informed us that the changes suggested by the auditor had been made, but the national outlook seemed predominant in his thinking; he went ahead then— the newspapers at that time were playing up a bad business year outlook, and he went into that, stating about the automobile industry and the steel industry in general, it seems to set the pattern for the whole national picture, and then he quoted several jobs that the Company had been unsuccessful in their bids about the State, and I think he quoted 2 or 3 TVA jobs they had been unsuccessful on and Mr. Truitt, Sr., said somehow or another they just could not seem to estimate the jobs with the other shops for they seem always to come out on the big end of the horn, or somebody could always bid lower; and in spite of that, they said they were going to go out on a limb and offer us an additional 2½ cents increase at that time on a 90-day conditional basis."

Head stated that prior to the meeting of January 28 that he gave Wallace Truitt and Mr. Douglas a copy of the supplemental agreement and asked them to consider it in their next meeting, and "so we met again in January 28; I told the Company the men felt like they had not made any definite offer, since they wanted to put it on a 90-day conditional basis, that if at the end of 90 days the Company could take it away, then the men felt like they was not being offered anything, and they wanted proof if the Company

was not making money they wanted proof to substantiate that claim." In answer to the question as to who wanted proof to substantiate that claim Head replied: "the men in the shop wanted proof, because they said if the Company was not making money, then they wanted to help them make money."

Stating that the Company would not agree to show proof he testified: "Mr. Douglas said that although the Union had requested the Company's records to substantiate the Company's proof that the Company felt like we didn't have any legal right to such proof or the records of the Company to substantiate that claim, so we then went into a general discussion of business conditions and reasons or ways to improve conditions if the Company was not making money, we wanted to know how; . . . if the Company were not making money, then the men wanted to make the Company money, because the Company was not paying as high wages as they were elsewhere, and the men were simply wanting to make more money themselves and likewise in making more money they would make the Company money."

The next meeting was on February 10 at which time Head testified, "Mr. Douglas went into the charges pending before the Board concerning the wage increase request, and he still maintained that we didn't have no legal right to the increase, and he told me the Company had took another look at their bids or their work schedules and several of the people had withdrawn their plans for jobs and the general picture didn't look good at all, and in face of that the Company was withdrawing the offer of 2½ cents." Head stated "he kinda reviewed the situation of what we had talked about, the Company's position to give more money would put them out of the competitive picture, they would be unable to get any jobs; and I told him that the men still felt like if the Company was not making money they wanted to know why, and it was hard for the men to see or understand the overhead and all that stuff, if the Company was not making money then they wanted to know, wanted to be shown some proof." Head stated that the

Company never did show any exhibits as to how they compared with their competitors, they merely "quoted" and maintained that it was none of the employee's business nor did they have any legal right to such records.

Over objections of General Counsel the witness was asked, "Mr. Head, did you at any time during your negotiations with Truitt Manufacturing Company, on behalf of the Union, has the Company ever refused to meet with you and your committee and discuss the issue raised at these meetings." Answer — "No, they, you have always bargained."

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On cross-examination Head admitted that the Company spokesman quoted Carolina Steel Company and Peden Steel and Bristol Steel as contended by the Company to show that they were already paying more than their competitors in the area. Head admitted that the Company gave exact names and figures and prices of jobs that it had lost on being underbid, but stated that the Union did not ask for any documentary proof of that. In this connection he stated "they stood firm on that, with the explanation there that if they gave more then it would put them in a position where they would not be able to get jobs." He stated that on August 7 the Union repeated its demands and the Company took its same position, and the strike followed on August 10. He added that on August 12, during the strike, "the Company took the same position." At the January 13 meeting that the Company repeated its position with regard to its competitive position in bargaining in bidding, and thereafter showed actual examples of being underbid. Head stated that the position of the Union was that the Company was in competition with firms in Ohio, West Virginia and Tennessee areas, and although places like Akron and Cleveland and Pittsburgh and Birmingham were named he did not admit them to be areas involved in the wages paid in Charlotte.

Questioned on the meaning of "snch books, records,

financial data, etc." Head testified; "Well, the main thing we were after, Dick, (Douglas) was anything to substantiate the Company's claim that they were not able to give any more than 2½ cents; anything relating to the reason why they were not able." Over objections of General Counsel on the ground of immateriality Head was allowed to answer what he meant in his letter of September 2 for "such books, records, financial data, etc.—Did you have in mind, or were you asking that a C. P. A. be allowed to inspect the Company's books completely and take what he thought was pertinent, or, were you asking for the Company to select what it thought was pertinent and furnish that to your C. P. A.?" Head answered, "I think the Company should, or we wanted the Company to furnish proof by records, or anything relating to their claim of being unable of giving any more increase."

In answer to Counsel Douglas's question as to whether or not the Union was asking its C. P. A. have access to the books and select pertinent data or whether the Union was asking for the Company to select the data to substantiate its position and furnish such data to the Union, Head answered, "Well, the only way I know to answer that, Dick, is that we were wanting anything relating to the Company's position, any record or what have you, books, accounting sheets, costs expenditures, what not, anything to back the Company's position that they were unable to give any more money. I think all that should be laid before an accountant."

In answer to the question as to whether or not it would be the Union's accountant or an accountant supplied by the Company, Head answered, "Well, we never did discuss any of that, simply because the Company said it was none of our business, and we had not discussed anything along that line. Whose or who or what." In further answer "Now, when you speak of full and complete information with respect to its financial standing and profits, did you consider that to mean complete access to the Company's books and financial data?" Answer—"Anything relating to the Company's

position that they were not able to give any more money." Again "Mr. Head, in view of your just having stated that you were asking in these letters for full and complete information and everything in the financial data, if it were necessary, to substantiate the Company's position; since you have explained you wanted everything to substantiate the Company's position, I am asking you if, from start to finish, you have not understood that the Company's position was that it could not raise wages because it would price itself out of competitive bidding." Answer—"There was a statement. Dick, I believe along in conjunction with the negotiations, during the negotiations there was a statement made, well, not only these negotiations, but I believe you will agree with me that Mr. Truitt, Sr., said that the Company had never paid dividends, was under capitalized, they didn't have working

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capital, and to grant more than the 2½ cents at this time would simply put them out of business." Question—"Put them out of business because they could not get the bids, is that right?" Answer—"Well, you maintained that position that you were in a competitive [position]."

Explaining to Counsel Douglas further "it is hard for the men to understand about overhead and all that stuff" Head testified, "Yes, and I believe you will recall with me, Dick, that during negotiations the statement was, for the facts were brought out, we were discussing the work operations, etc., and I told you it was hard for a working man to realize the actual cost in operating the plant; I said they see material being processed through the shop, they see it going out, they see trucks back up and freight cars come in and load and these jobs going out and the Company is making money"; and Mr. Truitt spoke up and said, "Well, that is not the case, there is a lot to it than that." In answer to conclusionary question: "Mr. Head, suppose you had had access to all of the Company's financial data regarding overhead costs, salaries, expense, everything that you ap-

parently were asking for, could you have analyzed this Company's position with respect to its competitive position if you did not have similar information from the Company's competitors?" Head replied that "we were not bargaining with any other" but admitted having no other information, and adding: "I think we could have drawn a conclusion from the data if it was submitted; I think it was possible we could have drawn our conclusion whether the Company was able to pay or not."

Testimony of General Counsel's remaining witnesses, set forth below, concluded his case in chief. Henry D. Cole, a member of the union negotiating committee, testified that when Head, at the August 4th meeting was putting forward the question of increase of at least 10 cents Mr. Truitt raised up and said "it would break the Company up to give up that much pay raise, and it would put them in a precarious position."

George F. Beck, a member of the union negotiating committee, testified concerning a bargaining meeting occurring after the strike: "We were still asking for an increase greater than two and a half cents per hour, and the Company said then that they could not afford to pay over two and a half cents per hour, and they were talking about the other companies at this time and they said they just could not afford it, that they had been losing money on jobs and said, "take for instance the Bethlehem Steel, said they could not compete with them, the big boys, they said." Asked the reason why Truitt could not compete with the big boys Beck answered: "They claimed we were asking for too much money, too much per hour rates." He attributed this statement to President Truitt: "And he said that Truitt could not compete with companies like that, said Bethlehem Steel, said they were an old company, and they had the capital and said "we are just a young company, and we don't have the capital, the working capital, and it would break us up." Beck admitted that after each company officer spoke against a raise of over two and one-half cents, a reason was given, among which was: "Well, competitive

business was one." Beck agreed that Douglas, as spokesman, would go ahead and explain it by basing it on 'our competitive position in business.'

John W. Sandlin also a member of the union negotiating committee testified that at the January meeting they were discussing a two and a half cent raise for a period of 90 days: "I asked Mr. Truitt, I said at the end of 90 days you can either take it away or leave it there at the end of 90 days, I said, now, what proof are we going to have to put before these men, provided you do take it away, what proof are we going to have that the Company is in financial difficulty that they can't pay it; and Mr. Truitt put in and said; "John, that just goes to show that you don't believe a word I have said" . . . I just stated that the reason why I wanted the proof was that the men were going to ask us at the end of the 90 days and if they do withdraw the two and a half cents, they were going to want to know why."

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g. *Testimony of Respondents witnesses*

John R. Truitt, vice president in charge of sales, testified that all of the officers of the Company including its Counsel Douglas got together in preparation to respond to the Union's appeal for a contract wage reopening and decided because of "our competitive position" upon a 2½ cent per hour increase . . . . "That was as far as we could possibly go from the competitive angle." Counsel Douglas was made spokesman of such company policy, and the record shows that to be the formula he used. John Truitt testified that the company wage rates and competitive rates were discussed with the Union stating: "Presenting the picture across the board, we were reasonably unsuccessful in getting the shop committee to consider it (comparative wage data submitted by 4 competitors) favorably or fairly." In discussing particular jobs which had been bid and lost he contended that "the actual evidence of this picture was presented" and denied declining or refusing to give the Union any supporting data of the Company's position. On

cross-examination he testified that the Union offered to support its contention that the Company's competitors were paying higher wage rates and operating at a profit but he answered that these were "fabricating concerns outside of our general area . . . We had evidence to show we were paying actually higher rates than all but one of these [local area concerns] that one being Carolina Steel, with which we were on par; and I might add, needless to say, they are our chief competition." He admitted that the Union denied the correctness of this contention, charging that Bristol Steel was paying higher wages. He explained that his interest in and chief function was from the sales angle to point out "just where we stood competitively." He cited several specific cases of bids lost on bid sheets prepared by himself but admitted that he did not personally offer and hand them to the Union stating: "they were not offered because they were not asked for." He however admitted that the Company did not present any information on jobs which they had bid upon successfully.

Wallace B. Truitt, the purchasing agent, testified that he was present when the comparative rate of pay in the various companies were gone into, and the discussion concerning unsuccessful bids. His recital was that John Truitt brought the bids into the conference room at a meeting January 11, 1953, and when he left for a prior engagement, the meeting was called to order, saying: "this evidence was given to the committee in this fashion, our attorney, Mr. Douglas, took them at random, opened them up with my assistance showing him what was which, read off the bids of our competitors and our bids, and that was the general procedure of that presentation." He stated that there was no refusal to give the Union the documents nor any request for them or for any other documents other than the request made in the Union's correspondence. He testified, as did his brother John, that their father, W. B. Truitt, president of the Company, was an elderly diabetic and may have said: "Well, boys, if we give it to you, we might go broke." Wallace indicated that his father was in a highly nervous state—"his insulin runs up on him, he can't think clearly

late in the afternoon—he walked out of the room." He stated that his father's outburst did not change the official position of the Company—'the competitive position.'

h. *Discussion*

Actually there are very few factual conflicts and credibility issues involved herein. As both counsel agreed this case is largely a question of legal interpretation of almost agreed facts. General Counsel contends that the company officials "plead poverty—" throwing the decision squarely under the *Jacobs* case doctrine *(supra)*, while Respondent counsel contends that the facts present a new and novel situation which thereby constitutes it a case of "first impression" to the Board and the courts.

It is clear that Respondent officials worked out their theory or formula immediately after the Union requested the contract reopening for

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wage negotiations on June 8, 1953, delegated their attorney to be spokesman, and insofar as possible, followed the formula—no doubt originated by and upon advice of counsel. It was not an afterthought. Their syllogism becomes, however, a non sequitor if the qualification, "admittedly injecting an economic factor into bargaining," vitiates either the major or minor premise.

From the evidence recited and relied upon, I find that company spokesman Douglas said, after offering 2½ cents and stating that they were paying as much or more as any of their competitors that "that would be all that they would be able to give at this time"; if they would give more than their offer, it would put them out of competition of getting business with other competitors; that the Company found profits in regard to sales and costs was low; that the labor cost was high and the Company being undercapitalized was struggling under a financial strain; that the Company had just negotiated a loan from a bank to buy new equipment and an additional needed lot. I further

find that President Truitt said that the Company had never paid dividends was undercapitalized, didn't have working capital, and to grant more than 2½ cents at this time would simply put them out of business, and finally "it would break the Company up to give up that much [10 cents] pay raise, it would put them in a precarious position." It is difficult to conceive of economic conclusions thus expressed more calculated to require financial documentation to a group of working men than are these undenied assertions, nor a case more illustrative of a plea of financial inability to grant a requested wage increase. Accordingly I find that this case falls within the doctrines of *Southern Saddlery* and the *Jacobs* case *(supra)*.

The general rule applicable to requests for financial data and facts is that such information, if relevant, upon request must be furnished as to all issues properly the subject of collective bargaining so that the collective bargaining representative may intelligently represent the employees in the appropriate unit. *N. L. R. B.* v. *Yawman & Erbe Manufacturing Company,* 187 F. 2d 947 (C. A. 2). The rejection of economic demands because of *competitive conditions* within an industry with no accompanying effort to prove the assertion or to persuade the Union involved that competition was the real reason for the rejection of the demands was held to be evidence of bad faith bargaining. *Stonewall Cotton Mills,* 36 NLRB 261 enforced as modified 129 F. 2d 629 (C. A. 5) cert. den. 317 U. S. 667.

In *West Fork Cut Glass Company,* 90 NLRB 944, 952-3, the Board affirmed a finding by a Trial Examiner that when a request for the production of such records as would disclose financial ability or inability to grant a wage increase was rejected, but the company agreed to open its books to a certified public accountant or a disinterested third party, in view of all the circumstances, bad faith bargaining, had not been established.

In his brief to me, Respondent's counsel attempts, unsuccessfully, to distinguish this case from *Southern Saddlery* and *Jacobs* cases as follows:

In the *Saddlery* case, the Respondent said only that it was financially unable to pay. The Truitt Company said it would have to put itself out of competitive bidding and thus could not get buisiness.

In *Saddlery*, the Respondent made no counterproposals, made no "sincere effort to persuade the Union", and did not give sufficient information for the Union to discuss the issues raised.

The Truitt Company made a counterproposal and offered 2½ cents; did its best to explain to the Union, and gave figures to show it already paid more than most of its competitors, and showed contracts it had lost by being underbid by competitors paying low wages.

In the *Jacobs* case, the company said it was "futile to discuss" wages because of financial inability to pay, and *refused to discuss the other issues at all.*

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The Truitt Company met many times to discuss everything the Union wanted to discuss (except show its books).

In the *Jacobs* case, the company should have presented "sufficient underlying facts to show its conclusion was reached in good faith."

The Truitt Company gave the Union the pay scales of its competitors in the area, reading from lists at the bargaining table, and comparing its own wages. Later, Truitt told the Union about contracts it had lost from being underbid.

That General Counsel argues that the Truitt Company gave the same reasons as Saddlery and Jacobs financial inability to pay—Yet witness after witness for the General Counsel said that the Company gave its competitive position as its reason, citing:

> Julian Head, principal negotiator for the Union, said:
>
> They stood firm in their position, that since they were paying as much or paying more than competitors, it

would put them out of competition of getting business with other competitors. (page 10, line 22)

. . . and the Company took the same position that day as they did in the first meeting (page 11, line 9)

. . . he (Douglas) kinda reviewed the situation of what we had talked about, the Company's position to give more money would put them out of the competitive picture . . . . (page 24, line 24)

Yes sir, they stood firm on that, with the explanation that if they gave more then it would put them in a position where they would not be able to get jobs. (page 33, line 24)

(See also page 38, line 8) (page 70, line 22 and Page 71, line 13 in the testimony of George Beck)

It is true that there is evidence that Mr. W. B. Truitt, president of Respondent Company, said on 1 or 2 occasions, "We would go broke if we gave that raise." However, Respondent contends that the officers of the Company had met, established an official position of the Company, gave its attorney full authority to act as spokesman, and maintained that position throughout many sessions—the same position referred to by the union witnesses—and that 1 or 2 outbursts by an elderly diabetic man whose insulin count was troubling him, did not change the Company's bargaining position. Respondent points out that the Company never declined to show the Union its competition figures and its underbid contracts. The evidence shows clearly that while the Company was quoting figures and rates to substantiate the position it had taken, the figures and rates were there at the bargaining table, being read a few feet away from union negotiators, but no request was ever made to see them. Summing up, the Respondent contends that it substantiated its reason for refusing the wage demands by submitting facts and figures, and that the Respondent should not be found to have refused to bargain with the Union.

j. *Conclusions*

With Respondent's interpretation of the facts and the law, I find myself not in accord.

The Courts and Board have made it clear that the determination of whether there has been compliance with the obligation to bargain in good faith, depends ultimately on the facts and circumstances of a particular case.

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The testimonies established an underlying financial inability to meet the Union's demand, and the Company failed to produce books and records to substantiate its conclusions as required under the law as laid down in *Yarman and Erbe* (supra), and in many other cases decided by the Board. The phrase 'competitive position' as used and relied upon by Respondent amounts, only to an exercise in legal semantics. Therefore the 2 questions raised are answered: (1) the Company did plead financial inability as its reason for rejecting the Union's wage demand and failed to produce relevant information to justify such refusal, and (2) an employer cannot refuse a demanded wage increase on the grounds that *such increase would put him out of a competitive position*, even though he were paying the prevailing area wage scale, unless he factually documents this conclusion.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents, set forth in Section II above, occurring in connection with the operations of the Respondents set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondents have engaged in unfair labor practices, the undersigned will recommend that they cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. It having been found that the Respondent has referred to bargain collectively with the Union as the exclusive representative in an appropriate unit, it will be recommended that the Respondent upon request bargain collectively with the Union.

Because of the limited scope of the Respondent's refusal to bargain, and because of the absence of any indication that danger of other unfair labor practices is to be anticipated from the Respondent's conduct in the past, we shall not order the Respondent to cease and desist from the commission of any other unfair labor practices.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A. F. L., is a labor organization within the meanings of Section 2 (5) of the Act.

2. Truitt Manufacturing Co. is engaged in interstate commerce within the meaning of Section 2 (6) and (7) of the Act.

3. All production and maintenance employees, including checkers, truck drivers and leader men exclusive of Respondents employed at their Greensboro plant, exclusive of office clerical employees, guards and supervisory employees, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Iron Workers of Amer-

ica A. F. L. was on October 27, 1950, and at all times thereafter has been, the exclusive representative of all the employees of such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

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5. By refusing on July 27, 1953, and at all times thereafter, to bargain collectively with Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Iron Workers of America, A. F. L., as the exclusive representative of its employees in the appropriate unit, the Respondents have engaged and are engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

6. By the above conduct which interferes with, restrains, and coerces its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of this Act.

7. The aforesaid labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, the undersigned recommends that the Respondent, Truitt Manufacturing Co., their agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other conditions of employment with Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A. F. L., as the exclusive representative of all of the Respondents production and maintenance employees including checkers, truck drivers, and leader men at its Greensboro plant.

(b) Upon request bargain collectively with Local Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A. F. L. as the certified exclusive bargaining agent of all employees in the bargaining unit described above in paragraph 1 (a) herein, with respect to wages, rates of pay, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(c) Post at his plant at Greensboro, North Carolina, copies of the notice attached to the Intermediate Report herein, marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Eleventh Region shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof and maintained by him for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(d) File with the Regional Director for the Eleventh Region on or before twenty (20) days from the date of the receipt of this Intermediate Report, a report in writing setting forth in detail the manner and form in which the Respondent has complied with the foregoing recommendations.

It is further recommended that unless on or before twenty (20) days from the receipt of this Intermediate Report, the Respondent notifies said Regional Director, in writing, that he will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

Dated at Washington, D. C. this 30th day of June 1954.

JOHN C. FISCHER
Trial Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT engage in any acts in any manner interfering with the efforts of LOCAL 729 OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS OF AMERICA, A. F. L. to negotiate for or represent the employees in the bargaining unit described below.

WE WILL bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, rates of pay, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees at the Employer's Greensboro, North Carolina plant, including checkers, truck drivers, and leadermen.

TRUITT MANUFACTURING COMPANY

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

The Respondent, Truitt Manufacturing Company, objects and excepts to the Intermediate Report and Recommended Order of Trial Examiner, John C. Fischer, on the following grounds:

FINDINGS OF FACT

1. The Trial Examiner erred in finding that the Respondent refused a wage increase on the grounds of inability to pay.
2. The Trial Examiner erred in failing to find that the Respondent's refusal to grant a 10 cents an hour wage raise was based on the fact that such a raise would put the Respondent out of its competitive position in the steel fabrication industry.

REASONS FOR EXCEPTIONS

The Record is clear that throughout weeks of negotiation, the Spokesman for the Respondent, R. D. Douglas, Jr., Attorney, continually objected to the wage increase because of its result on the Company's position in competitive bidding.

This was set out in the testimony of Julian Head, Union Organizer and Spokesman for the Union in the Negotiations. On Page 10 of the Intermediate Report, lines 1 through 14, the Trial Examiner pointed out that Mr. Head admitted that the Company continually repeated its same reason for objecting to the wage increase.

The Examiner apparently was convinced that this was indeed the Company's position, its theory and its stated reason. He states, on page 12, line 60 of the Report;

> "It is clear that Respondent officials worked out their theory and formula immediately after the Union requested the contract reopening for wage negotiations on June 8th, 1953, delegating their Attorney to be spokesman, and insofar as possible,

followed the formula—no doubt originated by and upon advice of counsel. It was not an afterthought."

Then the Examiner comes to the comment made by Mr. W. B. Truitt, President of the Company. Witness Cole said that Truitt said;

> "It would break the company up to give them that much pay raise, and it would put them in a *precarious* position." Page 65, line 9 of the Record.

But witness Cole said that the Company spokesman never said anything like that. Page 66, line 11 of the Record.

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Witness Beck had a different recollection. According to him Mr. Truitt said that the Company could not compete with Companies like, say Bethlehem Steel, that they were old Companies and had the capital and "We are just a young company, and we don't have the capital, the working capital, and it would break us up". Page 68, line 12 of the Record.

Yet when Witness Beck was questioned about all the other persons who spoke for the Respondent and all other times, Beck admitted "Well you tried to give a reason whenever you said you could not pay over 2½ cents; you tried to give a reason then why you could not". When asked what reason was given Mr. Beck said "Well, competitive business was one".

It is admitted by the Respondent that Mr. W. B. Truitt is President of the Company; however the Record is clear that the Company's bargaining position was established by its officers before the negotiations commenced; that the Company's Attorney, Douglas was delegated to speak for the Company, and that Mr. Truitt was an elderly diabetic who said practically nothing through the weeks of negotiations, until his quoted statement, made late one afternoon after a long bargaining session.

Yet the Examiner seems to seize on this as the key to the entire case, quotes Mr. Truitt freely, then says that the

case falls within the doctrines of the Southern Saddlery case and the Jacobs case. Finally the Examiner says "The phrase 'competitive position' as used and relied on by the Respondent, amounted to only to an exercise in legal semantics".

The Respondent is not endeavoring to argue that Mr. Truitt's statement is inadmissible as evidence. However, Respondent is attempting to point out that the Examiner gave undue weight to a short statement made by the elderly Mr. Truitt, when the Examiner had already found as a fact by the testimony of the Union witnesses themselves that the company maintained its position regarding competitive bargaining throughout the months of negotiations.

The Examiner states at the top of Page 13 of his report "Their syllogism becomes, however, a non sequitor if the qualification, 'admittedly injecting an economic factor into bargaining', vitiates either the major or minor premise."

The Respondent feels that this throws unusual light on the reasoning of the Trial Examiner. Attention is called to the last paragraph on Page 5 of the Intermediate Report, wherein the Examiner sees a syllogism in the Respondent's reasoning. Apparently the major premise is that there is considerable law to the effect that a refusal to grant wage increases because of inability to pay carries the duty to prove such inability. The minor premise is the contention of the Respondent, that it based its refusal to grant increases on competitive grounds, although this admittedly injected an economic factor into bargaining. The conclusion of the syllogism is that the Respondent has no duty to disclose its records.

It cannot be denied by the Respondent that when an employer states that he is paying the prevailing wage in his area, and that failure to meet competition would eventually put him out of business, this does concern economic factors. However, the Respondent contends that the economic factor, though injected into bargaining, does not, as the Examiner suggests, vitiate either the major or the minor premise. The Respondent feels that the Trial Examiner, having established in his mind that *any economic factors*

introduced into bargaining must be accompanied by a disclosure of Company records, subsequently found it unnecessary to distinguish between preponderant evidence that the Company gave its competitive position as its reason for denying wage increases, and the statement of Mr. Truitt, tremendously outweighed by the other evidence, that the Company might go broke if it raised wages.

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CONCLUSIONS OF LAW

The Examiner's conclusions of law are in answer to the second question raised by him on Page 6, line 56 of the Intermediate Report. He asks;

> "the second is whether an employer can refuse a demanded wage increase on the grounds that such increase would put him out of a 'competitive position', and then substantiate this plea by demonstrating that he was paying the going area wage scale as contended by Respondent."

The Respondent contends that the Examiner erred in answering this question in the negative.

He says on Page 15, Line 9 of the Intermediate Report;

> "an employer cannot refuse a demanded wage increase on the grounds that such increase would put him out of a competitive position, even though he were paying the prevailing area wage scale, unless he factually documents this conclusion."

It is not clear just what he means. Does he mean that an employer must factually document his claim that he is paying prevailing wages? If so, the record will show that Truitt gave figures on its own and competitive wages.

Or does he mean that the employer must document his claim that an increase would put him out of a competitive position? If so, the record shows Truitt gave facts and figures showing it had already been underbid on several large jobs and had lost them.

Or does he mean, finally, that the employer must open all his financial data to the union; that any distinction between ability to pay, and ability to remain competitive in an industry based on bidding for jobs, is only "legal semantics"?

If the third meaning is intended by the Examiner, Respondent contends that this is new law, far-reaching law, and law which will have a disastrous effect on collective bargaining throughout industry. If this were the law, then all friendly bargaining would cease. No employer would dare explain how increased labor costs would make him price his product out of the market; how competitors would outsell him. For unless he stood ready to open all his confidential financial data to the union, he could say nothing but "No" to wage demands, and could give no fair, honest reasons. Respondent points out that the competitive approach to the question of wage increases is discussed in nearly every collective bargaining session in the United States, and neither company nor union has ever dreamed that this would lead to disclosure of all financial data.

The Examiner says this case comes within the Southern Saddlery and the Jacobs case. Since the Intermediate Report sets out clearly the Respondent's arguments concerning these cases, the Respondent will not repeat but only refer the Board to Page 13, Line 45—Page 14, Line 55 of the Intermediate Report.

The Respondent therefore, respectfully requests that the Board not accept the recommendations and Findings of Fact of the Trial Examiner, but rather the Board find that the Respondent was not obligated to open its books and records to the union and consequently the Respondent has not been guilty of refusal to bargain.

Respectfully submitted this 19th day of July, 1954.

R. D. Douglas, Jr.
Attorney for Respondent

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DECISION AND ORDER

On June 30, 1954, Trial Examiner John C. Fischer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report[1] attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report.

The Board has reviewed the Trial Examiner's rulings made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and the entire record in the case and hereby adopts the findings, conclusions and recommendations of the Trial Examiner except as modified herein.

We agree with the Trial Examiner that the Respondent failed to bargain in good faith with respect to wages in violation of Section 8 (a) (5) of the Act. We do not, however, mean to imply, nor do we adopt the statement of the Trial Examiner,[2] that the Respondent's failure to substantiate its economic position as to wages obligates the Respondent to accede to the Union's wage demands. On the other hand, it is settled law, that when an employer

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seeks to justify the refusal of a wage increase *upon an economic basis*, as did the Respondent herein, good faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by

[1] The Intermediate Report contains an obvious error which does not affect our conclusions herein. Thus, on p. 15 Line 28 the word "referred" was used instead of "refused".

[2] The Trial Examiner stated at p. 15, Lines 9-12 of the Intermediate Report that an employer cannot refuse a demanded wage increase on the grounds that *such increase would put him out of a competitive position*, even though he were paying the prevailing wage scale, unless he factually documents this conclusion."

reasonable proof.[3] In the present case, we are satisfied that Respondent has failed to submit such reasonable proof.[4] We shall, therefore, order that the Respondent bargain collectively with the Union.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Truitt Manufacturing Co., Greensboro, North Carolina, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers, of America, AFL, as the exclusive representative of all the Respondent's production and maintenance employees at its Greensboro, North Carolina, plant, including checkers, truck drivers and leader men, but excluding all guards, watchmen, the head shipping clerk and shop clerk, office clerical, professional employees, and supervisors as defined in the Act.

(b) Interfering in any other manner with the efforts of Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, AFL, to bargain collectively on behalf of the employees in the aforesaid bargaining unit.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, AFL, as the exclusive representative of all its

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[3] *The Jacobs Manufacturing Company*, 196 F. 2d 680 (C.A. 2) enforcing 94 NLRB 1214, 1221-2.

[4] Cf. *West Fork Cut Glass Company*, 90 NLRB 944, 952-3, *McLean Arkansas Lumber Company, Inc.* 109 NLRB No. 157, pp. 15-19.

employees in the aforesaid bargaining unit, with respect to rates of pay, wages, hours of employment, or other terms or conditions of employment.

(b) Upon request furnish Shopmen's Local 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, AFL, with such statistical and other information as will substantiate the Respondent's position of its economic inability to pay the requested wage increase and will enable the Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, AFL, to discharge its functions as the statutory representative of the employees in the unit found appropriate by the Board.

(c) Post at his plant at Greensboro, North Carolina, copies of the notice attached hereto and marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Eleventh Region shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof, and maintaind by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Eleventh Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. November 15, 1954.

GUY FARMER, *Chairman*
ABE MURDOCK, *Member*
IVAR H. PETERSON, *Member*
PHILIP RAY RODGERS, *Member*
ALBERT C. BEESON, *Member*
National Labor Relations Board

(SEAL)

APPENDIX A

NOTICE TO ALL EMPLOYERS

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board; and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with SHOPMEN'S LOCAL NO. 729, INTERNATIONAL ASSOCIATION OF BRIDGE STRUCTURAL AND ORNAMENTAL IRONWORKERS OF AMERICA, AFL, as the exclusive representative of all our employees in the appropriate unit described below.

WE WILL NOT in any other manner interfere with the efforts of the above named union to bargain collectively on behalf of the employees in the unit described below.

WE WILL upon request bargain collectively with the above named union as the exclusive representative of all our employees in the unit described below with respect to rates of pay, wages, hours of employment or other terms or conditions of employment.

WE WILL upon request furnish the above-named Union with such statistical and other information as will substantiate our position of economic inability to pay the requested wage increase.

The bargaining unit is:

All production and maintenance employees at our Greensboro, North Carolina, plant, including checkers, truck drivers, and leader men, but excluding all guards, watchmen, the head shipping clerk, and shop

clerk, office clerical, professional employees and supervisors as defined in the Act.

TRUITT MANUFACTURING COMPANY

.....

(Employer)

Dated ..... By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX TO RESPONDENT'S BRIEF

INDEX

TESTIMONY IN NATIONAL LABOR RELATIONS BOARD PROCEEDING

CASE NO. 11-CA-670

BOARD'S TRANSCRIPT OF RECORD:

(Page 25)

JULIAN F. HEAD

CROSS-EXAMINATION

Q. (By Mr. Douglas) Mr. Head, the Union and the Truitt Mfg. Company are now operating under its third contract, is that right?

A. Yes, sir.

(P. 29)

Q. (By Mr. Douglas) Mr. Head, did you at any time during your negotiations with the Truitt Manufacturing Company, on behalf of the Union, has the Company ever refused to meet with you and your Committee and discuss the issues raised at those meetings?

A. No, they, you have always bargained.

Q. (By Mr. Douglas) Now, at the first meeting you attended, (P. 30) which was in August?

A. Yes, sir.

Q. I believe you stated on direct examination that the

Co. stated that they were already paying more than their competitors in the area; is that correct?

A. Yes, they quoted Carolina Steel, and Peden Steel and Bristol Steel and I believe that is about all, as well as I remember, Carolina Steel and Bristol and Peden Steel.

Q. Now, with regard to a question Mr. Goldman asked you a short while ago, did the Company at anytime offer to show you any books, records or written data concerning its competitors; you answered "no," did you not?

A. Yes.

Q. Now, Mr. Head, at this initial meeting when the Company took the position it was already paying more than its competitors in the area, the Company, we had figures there before us, didn't we?

A. I assume you did, I didn't see any, you didn't show me none.

Q. When you and Mr. Sandling and some of the others asked about specific classifications, did not we check some papers we had there and tell you what the same men were getting at these other places?

A. I don't recall that, Dick.

Q. We had some figures?

A. You had some papers there, but I didn't see the papers, never (P. 31) did see the papers.

Q. You never did ask to see the papers, did you?

A. MR. GOLDMAN: I object.

MR. DOUGLAS: Now, Mr. Examiner . . .

THE WITNESS: Not at that time.

TRIAL EXAMINER: Now, just a minute.

(P. 32)

Q. Well, answer this, Mr. Head, did you at any time ask to see the papers from which we were quoting our competitors figures at that meeting?

A. No; you are talking about the first meeting, August 4th?

Q. Yes, sir?

A. No, we didn't ask to see them.

Q. Did you ever ask orally or in writing for any figures to substantiate our position that our competitors were paying more?

A. Later on.

Q. Do you recall the circumstances of that?

A. That was after the strike.

Q. But in these letters, Mr. Head, where you asked for a Certified Accountant to have access to the Company's Records, in either of those letters which you signed did you ask for any figures regarding our competitors' figures?

A. Well, . . .

Q. You may refresh your recollection, if you want to look at the letters which you signed?

MR. GOLDMAN: Well, now, we concede that what the Union requested of the Company in its letters calling for documentary proof was the documents which would tend to

show the Company's own financial status rather than the status of its competitors and I think that is what Counsel wants and we will readily concede it.

(P. 33)

MR. DOUGLAS: Do I understand General Counsel to concede that no request was ever made in writing or otherwise for the Company to substantiate by written documents its position that it was already paying more than its competitors. Is that admitted?

MR. GOLDMAN: That is correct, we admit that.

TRIAL EXAMINER: Well, that disposes of that.

Q. (By Mr. Douglas) Now, Mr. Head, I believe you stated I was acting as spokesman for the Company. I did most of the talking, didn't I?

A. Yes, sir.

Q. Hour after hour after hour?

A. Well, two or three hours at the time, about the usual meeting.

Q. And when I asked you at that meeting, or rather the Company offered two and a half cents, as you mentioned, and I asked you what the Union wanted, and you said you wanted ten cents. Is that correct?

A. I said that the men had in mind ten cents or better, or a minimum of ten cents.

Q. I believe your language was that the Company stood firm on its position that they were already paying more than their competitors, is that correct?

A. Yes, sir, they stood firm on that, with the explanation there that if they gave more then it would put them in a

position (P. 34) where they would not be able to get jobs.

Q. And, Mr. Head, I believe on subsequent occasions, we gave you exact names and figures and prices of jobs that we had lost because we had been underbid, did we not?

A. Yes, sir, you did that on one occasion, yes, sir.

Q. We discussed some eight or ten jobs and told you what we had bid, and told you who the successful bidder was, and how much they bid, did we not?

A. Yes, sir, you told us all that.

Q. You didn't ask for any documentary proof of that, did you?

A. No, sir, we didn't ask for any of it.

Q. Now, then, Mr. Head, on the meeting on August 7th, I believe you stated that the Union repeated its demands and the Company took its same position; is that what you said?

A. As near as I can remember.

Q. Then the strike started on August 10th?

A. Yes, sir.

Q. And lasted a week?

A. Yes, sir.

Q. And I believe on direct examination you stated that at a meeting on August 12th, during the strike, and I quote your words: "The Company took the same position." Is that right?

A. Yes, substantially.

Q. Now, then, Mr. Head, during this exchange of letters, which Mr. Goldman has introduced, I believe you

testified that there (P. 35) were no bargaining sessions during that exchange?

A. Not that I remember, Dick.

Q. There were no requests for bargaining there by you or us during that time, is that right; neither party refused to bargain during that time; it was simply not requested by either party; is that right?

A. Yes.

Q. Now, Mr. Head, at a meeting on November 27th, from which you refreshed your recollection with notes taken . . .

A. The 24th, wasn't it?

Q. Twenty-fourth, that is correct, it was at that meeting, wasn't it, we talked about the fact we had had an audit and were going to try to rearrange some office procedures?

A. Yes, sir.

Q. And we were trying to clear up our own house a little bit and asked you to hold off about a month or so, until after Christmas?

A. Yes.

Q. And then we would know where we stood, be in a better position.

A. Yes.

Q. And we both agreed to postpone . . .

A. Yes, sir, we agreed to postpone.

Q. Then, in response to that postponement we met on January 13th and I talked at some length about the National

picture," (P. 36) the newspapers at that time were full of stories about the automobile plants closing down, and the generally bad business outlook, were they not?

A. That was at the January meeting?

Q. Yes, sir.

MR. GOLDMAN: Was not the witness' attention directed to the November 24th meeting, Mr. Douglas; isn't that the meeting in which you are presently engaged in examining him?

Q. (By Mr. Douglas) I understood, Mr. Head, that I disposed of the November 24th meeting by saying we agreed to hold off, and meet again, and that as a consequence of our continuance, that we met on January 13th.

A. That is what I meant, Mr. Goldman.

Q. I am talking now about the January 13th meeting, was it at that meeting we discussed the general national business outlook?

A. Yes, you discussed it at that time.

Q. And it was at that meeting, wasn't it, that the Company discussed with you at a good deal of length the various bids and various jobs and what we had done?

A. Yes.

Q. And how we had been underbid?

A. Yes, you quoted several jobs, I didn't get them all.

Q. Now, Mr. Head, there is one thing that has not come out yet. Immediately after the strike, the Company did put into (P. 37) effect a two and a half cents an hour raise, did it not?

A. Yes, across the board.

Q. The Company discussed that with you, I believe, and stated that it didn't want to make it unilateral and asked if you had any objection?

A. I don't remember.

Q. MR. GOLDMAN: We will concede the Company's wage increase of two and a half cents an hour was not an unfair labor practice, nor was that alleged to be an unfair labor practice.

Q. (By Mr. Douglas) Mr. Head, do you know why, what motive appeared to you why the Company quoted those jobs and actual bid figures?

MR. GOLDMAN: Object; it calls for a conclusion on this witness' part as to what was a conclusion on the part of the Company, and is speculative and of slight weight.

MR. DOUGLAS: Mr. Examiner, the meat of this case is whether the Company substantiated the economic position it took. Now, I am asking Mr. Head whether he considered the Company's Exhibitions of its actual jobs on which it had been underbid and the exact figures, as to whether he considered that as the Company's substantiating its position, and I think that is material.

TRIAL EXAMINER: Let him answer.

MR. GOLDMAN: Just a minute.

TRIAL EXAMINER: Excuse me.

(P. 38)

MR. GOLDMAN: That is the same objection, Mr. Douglas previously raised; that is a conclusion for the Trial Examiner to draw, and I might add an objective criteria, Mr.

Examiner, and not only the state of this witness' mind or what he thought was in the mind of the Company.

MR. DOUGLAS: I will rephrase the question.

TRIAL EXAMINER: Rephrase it, Counsel.

Q. (By Mr. Douglas) Mr. Head, shortly before the Company discussed in detail these jobs that we had bid and lost, had the Company repeated its position that if it raised wages, it would price itself out of competitive bidding?

A. Well, you did that so much.

TRIAL EXAMINER: Answer it yes or no, and explain it if you wish.

THE WITNESS: The best I recall, Dick, you presented the National outlook in contrast to the President's pleading to all the people not to talk depression.

Q. (By Mr. Douglas) And you needled me about not being a loyal Eisenhower man when I talked depression, didn't you?

A. Yes, I did; I believe I also told you, Dick, that . . .

MR. GOLDMAN: Object. That question is somewhat far afield and political.

TRIAL EXAMINER: Get on the main issue.

MR. DOUGLAS: Maybe I can rephrase my question.

Q. Mr. Head, at this meeting, the National outlook was (P. 39) discussed, and the Company repeated its position with regard to its competitive position in bargaining in bidding, and thereafter showed you actual examples of being underbid; isn't that correct, didn't that happen at that meeting?

A. Yes, and you quoted me several jobs, or quoted to me and the Committee, several jobs that you had been unsuccessful in obtaining.

(P. 41)

Q. Now, Mr. Head, you have stated on Direct Examination on about five occasions, referring to five or six different meetings, that the Company's position was that it was already paying more than its competitors in this area. You folks thought out at some time or another, wages paid in Cleveland and Akron and Birmingham and other places a good distance from North Carolina, didn't you?

A. Well, we knew . . .

Q. Answer my question first and then explain.

A. All right.

Q. Did not you bring out in answer to our competitive position wages paid at these places like Akron and Cleveland and Pittsburgh and Birmingham?

A. Not all those places. I believe our position was there that you were in competition with firms in those areas, in the Ohio, West Virginia, Tennessee areas. I believe that is the way we had that.

Q. However, you did refer to the fact that our wages were not higher than those places, didn't you?

A. Yes, you gave us what you wanted, and then we told you (P. 42) that you were also in competition with those other Companies.

(P. 47)

Q. (By Mr. Douglas) Mr. Head, I repeat my question, that when you wrote this letter of September 2nd, for "such books, records, financial data, etc.," did you have in mind, or were you asking that a C.P.A. be allowed to inspect the Company's books completely and take what he thought was pertinent, or, were you asking for the Company to select what it thought was pertinent and furnish that to your C.P.A.? Is my question plain, Julian, as to what I am interested in knowing?

A. Yes, sir, I am trying to think. I think the Company should, or we wanted the Company to furnish proof by records, or anything relating to their claim of being unable of giving any more increase.

Q. Now, Mr. Head, that was the answer to a question you gave a moment ago. My present question concerns whether or not you were asking permission to have your C.P.A. have access to the (P. 48) books and select this pertinent data you have just mentioned, or whether you were asking for the Company to select the data to substantiate its position and furnish that data to you.

A. Well, the only way I know to answer that, Dick, is that we were wanting anything relating to the Company's position, any records or what have you, books, accounting sheets, cost expenditures, what not, anything to back the Company's position that they were unable to give any more money. I think all that should be laid before an Accountant.

(P. 49)

Q. But, Mr. Head, the point I am trying to get—and I submit, Mr. Examiner, this is very very vital as to

whether—Mr. Head, whether you intended to ask permission that a C.P.A. selected by no one as yet, whether he was to go into the Company's Office and have access to the Company's books, for him to determine what substantiated the Company's position, or whether (P. 50) you were asking the Company to select what it considered proper to substantiate what it considered to be its position; I am asking which of those two you had in mind?

A. Now, right in there you have got the phraseology there if—let me answer it this way, and see if it gives you what you want; if it took the complete records, profits, dividends, manufacturing costs, or what have you, anything, Dick, relating to the Company's inability to grant more money, then I think it should have been made available to the Accountant that was to examine the books.

(P. 65)

HENRY D. COLE

CROSS-EXAMINATION

Q. (By Mr. Douglas) Who was the spokesman for the Company during these negotiations?

A. You.

Q. Do you recall what time of day this was, I believe you said, Mr. W. D. Truitt said it would break the Company up?

A. That is right. Do I recall the time?

Q. Yes.

(P. 69)

A. No, sir, not exact time, I will say sometime in the afternoon, around two until four thirty, something like that, in between that time, I don't recall the exact time.

Q. Mr. Truitt suffers from diabetes, you know that of your own knowledge, don't you?

A. No, sir, I have never heard other than just talk there in the Plant, the only thing I know about it.

Q. You say he said it would break the Company up?

A. That is right.

Q. Did the spokesman for the Company ever say anything like that?

A. Not break the Company up, no, sir.

MR. DOUGLAS: That is all.

REDIRECT EXAMINATION

Q. (By Mr. Goldman) Do you know which one of the meetings before the strike that this statement was made at?

A. It was on August 4th.

MR. GOLDMAN: No further questions.

(P. 70)

GEORGE F. BECK

CROSS-EXAMINATION

Q. Well, what was that reason that we gave, Mr. Beck?

(P. 71)

A. Well, competitive business was one.

Q. Yes.

A. And then we just couldn't afford to give over two and a half cents.

Q. But then, when we said we could not afford to give over two and a half cents, you say that each of us gave a reason, and competitive bidding was one of the reasons we gave you?

A. Yes, sir.

Q. Did you ever hear me say "we cannot afford to pay over two and a half cents and stop without giving any further reason whatever? Do you understand the question?

A. Yes, sir, I understand it.

Q. Well, I am asking you, Mr. Beck, you stated that when we gave the statement that we could not afford to pay over two and a half cents, that we gave the reasons for it, and that one of the reasons was we could not afford to do it and stay in competition. Now, I ask you if, at any time, I, as spokesman for the Company, said, that we could not afford to pay over two and a half cents, if I used that language, I asked you if I did not go ahead and explain that by basing it on our competitive position in business?

A. Yes, sir, you did.

(P. 91)

JOHN R. TRUITT

DIRECT EXAMINATION

Q. Did the Company, through its spokesman, have

any documents or lists of any kind with regard to its competitor's wage rates?

(P. 92)

A. Yes, sir, we did.

Q. Were they communicated to the Union?

A. Yes, they were.

Q. Was any request made by the Union for those documents?

A. No.

Q. Now, Mr. Truitt, at that meeting, or any other meeting, (P. 93) was any discussion had concerning particular jobs which had been bid and lost?

A. Yes, sir, we had discussed that in a general way in all the meetings prior to the first meeting in January, at which time the actual evidence of this picture was presented.

Q. Did you have any documents available at that time?

A. Oh, yes.

Q. Did the Union request such documents?

A. No, sir, they did not.

Q. Then, Mr. Truitt, to the best of your recollection, other than what transpired in these letters which have been introduced, did the Company every decline or refuse to give the Union any supporting data of its position?

A. No.

(P. 95)

CROSS-EXAMINATION

Q. (By Mr. Goldman) Mr. Truitt, in essence, is it not correct that what you mean to say about the Company's statement that it was paying as much as its competitors is simply that you were unable to persuade the Union that was a valid argument, isn't that right?

A. We had the evidence to support it, that is my only answer to that.

Q. And what evidence did you proffer to show the Union?

A. We had statements from various firms, Peden Steel, Dave Steel, Carolina Steel; it was erroneously stated before that we had them from Bristol; actually, we requested them on two different occasions and we never received any information from (P. 96) Bristol, but we certainly had those three, and it seems to me we had four Companies represented; we had requested this information from them and you must realize it was information of a very, very confidential nature; but we had typewritten lists of the wage rates that each was paying and general rough classifications.

Q. And the Union on its part contended that other of the Company's competitors were paying wage rates higher than those presently paid by the Company, and its competitors are still operating on a paying profitable basis, isn't that true?

A. The only evidence that the Union offered to support that claim was that these fabricating concerns outside of our general competitive area.

Q. But the Union certainly made that contention in opposition to your claim that you were paying the same as

all the other Steel Fabricating Companies in this area, isn't that right?

A. Well, we had evidence to show we were paying actually higher rates than all but one of these, the one being Carolina Steel, with which we were right on par; and I might add, needless to say, they are our chief competition.

Q. But you don't dispute that the Union did say that it was the Union's opinion that other of the Companies competitors were paying wages higher than you were paying and they were still able to operate on a profitable basis?

(P. 97)

A. Yes.

Q. Not that that contention is correct, but that it is the contention the Union made in answer to your contention.

A. I believe I remember hearing that statement being made, yes.

(P. 98)

RECROSS EXAMINATION

Q. (By Mr. Goldman) Did you offer to the Union these bid sheets that you said you had at that time?

A. You are speaking now of the jobs?

Q. Yes, sir.

A. Contracts that we . . .

Q. That is right.

A. They were not offered as such; they were not requested.

Q. At what meeting did the Truitt Manufacturing Company bring in the bid sheets?

A. It was in the meeting of January 11th, I believe that is the correct date; and actually, if I remember correctly, they were never requested by anybody, we offered them voluntarily as evidence to support our position that we simply could not put this wage thing in from a competitive standpoint.

Q. Wasn't that after the Truitt Manufacturing Company received a request from Mr. Head that the Truitt Manufacturing Company substantiate its position in bargaining negotiations with whatever relevant proof it had; isn't that correct; to put (P. 99) it shortly, Mr. Truitt, is it not after the receipt of General Counsel's Exhibit No. 3 that you did not offer to the Union your bid sheets, and I show you General Counsel's Exhibit 3.

A. It was not done in answer to that, I can say that.

Q. It was not done at all, and the bid sheets were at no time offered to the Union, isn't that right?

A. Let me put it this way; they were in no way offered as answer to the particular request made in that letter. They were offered purely to substantiate our position that we had maintained ever since the negotiations had started.

Q. It is a fact, Mr. Truitt, that after the receipt of this letter, which I just showed you, General Counsel's Exhibit 3, the Truitt Manufacturing Company had its sheets, and it had them for the first time after this.

A. I reiterate my statement which I made before, those things had been discussed in a general way, and it can be verified, and I point out my chief function in most of those negotiations was from the sales angle to point out just where

we stood competitively, because in my position, I am in better position to see that than most anybody in the organization; I had pointed that out verbally, I had cited several specific cases, and we decided we were getting nowhere with that, so I would present concrete evidence, which came merely by pulling the files.

Q. You presented in the negotiations the Company's viewpoint with regard to the impact of the projected wage increase of (P. 100) wages, is that correct?

A. That is right.

Q. And second, although you compiled certain bid sheets, you did not subsequent to the receipt of General Counsel's Exhibit No. 3, ever show them to the Union, isn't that right.

A. Not until January 11th.

Q. And did you show them to the Union and offer them to the Union at that time?

A. Yes, sir.

Q. Did you hand the bid sheets across the table to Mr. Julian Head or any other Representative of the Union in this case?

A. I don't know that that was done, but it was not asked for, and I will have to simply state this, that I brought the files down and I was absent from that particular meeting for about the first thirty minutes; when I got back in, this evidence had been presented; exactly how it was presented I cannot verify, but the files were there, they were on the desk, they were open and could be examined by anyone in the room by simply getting himself in position to see them.

(P. 102)

WALLACE B. TRUITT

DIRECT EXAMINATION

Q. (By Mr. Douglas) Mr. Truitt, what is your position with the Company?

A. I am another one of those Vice-Presidents, and I am the Purchasing Agent.

Q. Mr. Truitt, were you present on this occasion which you have already heard about when a discussion was gone into concerning the comparative rates of pay in the various Companies?

A. I was.

Q. On that occasion, was any request made by the Union, or anyone on its behalf, to see the documents that were presented?

A. Not to my recollection, no, sir.

Q. Were you present on this subsequent occasion which has been discussed, when your office documents and files were used in a discussion of bids you had entered into but failed to get?

A. I was.

Q. Were you present on the occasion when Mr. John Truitt just testified that he was out of the room?

A. I was.

Q. Will you tell the Examiner what transpired during the discussion of those bids, unsuccessful bids?

A. I don't remember the number of bids we had, but it was a considerable number. Mr. John Truitt had got them

out of the files, had one of the girls to, rather, and he came down, and (P. 103) having a previous engagement, said "I will have to be out of the meeting about thirty minutes," and threw them down on the desk; then when the meeting was brought to order, shortly afterwards, after discussion, this evidence was given to the Committee in this fashion, our Attorney, Mr. Douglas, took them at random, opened them up with my assistance, showing him which was which, read off the bids of our competitors and our bids, and that was the general procedure of that presentation.

Q. Were those files and records in plain sight of the Union Committee at that time?

A. They were.

Q. How far away?

A. I would say four or — four feet.

Q. Four feet?

A. As a maximum.

Q. Was any request made by the Union, or anyone on its behalf at that time to see the documents which you say I read from?

A. I don't remember anybody asking.

Q. Was there any refusal to give the Union those documents?

A. No, sir.

Q. Other than the refusal that speaks for itself in these letters mentioned some minutes before, is that right?

A. That is correct.

Q. Mr. Truitt, during the last three or four negotiations sessions, do you recall whether or not any renewed

demand was (P. 104) ever made for any documentary proof on the part of the Union?

A. No, sir, I don't.

Q. Were you present at all those last four or five meetings?

A. I was present at all the meetings.

Q. As far as you know, did the Union ever make any demands for information to substantiate the Company's position other than that outlined in these letters?

A. No, sir.

94 In the United States Court of Appeals for the Fourth Circuit

No. 6989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUITT MANUFACTURING CO., RESPONDENT

Petition for enforcement of an order of the National Labor Relations Board

Filed April 8, 1955

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

[File endorsement omitted.]

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 141, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Truitt Manufacturing Co., Greensboro, North Carolina, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Truitt Manufacturing Co. and Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A. F. L., Case No. 11-CA-670."

In support of this petition, the Board respectfully shows:

(1) Respondent is a North Carolina corporation engaged in business in the State of North Carolina, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on November 15, 1954, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon

95 Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which

transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

(S) MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 7th day of April 1955.

96 April 8, 1955, notification to respondent, together with copy of petition for enforcement, transmitted by mail to Truitt Manufacturing Co., 1016 Battleground Avenue, Greensboro, North Carolina.

April 12, 1955, appearance of David P. Findling, Associate General Counsel, and Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, entered for the petitioner.

April 23, 1955, appearance of R. D. Douglas, Jr., entered for the respondent.

97 In the United States Court of Appeals for the Fourth Circuit

Answer to petition for enforcement

Filed April 23, 1955

[Title omitted.]
[File endorsement omitted.]

The Respondent, Truitt Manufacturing Company, hereby answers the Petition for Enforcement, which has been filed by the National Labor Relations Board herein, and says:

1. The allegations of Paragraph 1 are admitted except as to the implication contained in the phrase "where the unfair labor practices occurred". As to such implication, the Respondent expressly denies that it has been guilty of any unfair labor practices as defined by law.

2. The allegations of Paragraph 2 are admitted.

3. Upon information and belief, the allegations of Paragraph 3 are admitted.

Wherefore, having fully answered, the Respondent prays the Court, upon review of this cause, to deny and dismiss the Petition for Enforcement herein.

DOUGLAS, DOUGLAS & RAVENEL,
Attorneys for the Respondent,
Truitt Manufacturing Company.

98 April 23, 1955, notification of the filing, together with copy of answer of respondent, mailed to National Labor Relations Board, Washington 25, D. C.

April 26, 1955, appendix to petitioner's brief filed.

April 29, 1955, certified transcript of record filed.

May 14, 1955, brief of petitioner filed.

June 4, 1955, brief and appendix for respondent filed.

June 15, 1955, appearance of Duane B. Beeson, Attorney, National Labor Relations Board, entered for the petitioner.

June 15, 1955, appearance of Whiteford S. Blakeney entered for the respondent.

Argument and submission (omitted in printing)

June 15, 1955

99 In United States Court of Appeals for the Fourth Circuit

No. 6989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

TRUITT MANUFACTURING COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Argued June 15, 1955. Decided July 30, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges

[File endorsement omitted.]

Duane Beeson, Attorney, National Labor Relations Board, (Theophil C. Kammholz, General Counsel; David P. Findling, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Frederick U. Reel, Attorney, National La-

bor Relations Board, on brief) for Petitioner, and R. D. Douglas, Jr., and Whiteford S. Blakeney (Douglas, Douglas & Ravenel, and Pierce & Blakeney on brief) for Respondent.

100 *Opinion*

July 30, 1955

PARKER, Chief Judge:

This is a petition to enforce an order of the National Labor Relations Board which found the Truitt Manufacturing Company guilty of an unfair labor practice in refusing to bargain with a union representing its employees in that, although bargaining with respect to all matters as to which it was asked to bargain, the company refused a request of the union that it allow an account to examine its books and records for the purpose of ascertaining whether it was financially able to grant the wage increase demanded by the union. The Board held that because the company had represented in the course of bargaining negotiations that it was not able to pay the wage increase demanded, a refusal to comply with the request of the union amounted to a refusal to bargain in good faith. The company contends that it bargained in good faith, and that it was not required to disclose to the union, as an incident of such bargaining, the books and records showing its financial condition and involving confidential matters such as manufacturing cost which it would be harmful to its business to make public. We think that the position of the company is correct and that it may not be held guilty of an unfair labor practice because of refusal to furnish such information to the union or to allow its books and records to be examined at the union's request.

The facts are that the company had duly recognized the union as the bargaining representative of its employees and had been bargaining with it for a period of three years. In the summer of 1953, the union made demand for a 10 cents per hour increase in wages and representatives of the union and the company met and negotiated with respect to the matter. The company offered a 2½ cents per hour increase and the union called a strike which lasted for a week. After the strike was ended the union renewed its demand for the 10 cents increase, and the
101 company again refused to accede to the demand but granted a 2½ cents raise, which was put into effect. During the course of these negotiations, the company made statements on a number of occasions to the effect that it could not afford a 10 cents increase, that it was paying wages as high or higher than competitors and that it had lost contracts to lower bidders because of bids based on the wages that it was paying.

The union asked to see its books and records in substantiation of these statements. The company offered to produce all records relating to bids and wages paid but refused to permit examination of its books and records with respect to other matters. The letters of the union making the first demand was a letter of September 2, 1953, which contained the following paragraph:

"Representatives for the Truitt Mfg. Company have claimed, during our lengthy negotiations, the inability to grant an increase in excess of two and one-half (.02½c) cents per hour, therefore Shopmen's Local Union No. 729 respectfully requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal and/or counter proposals of a wage increase in excess of two and one-half (.02½c) cents per hour."

Counsel for the company in a letter of September 4, 1953, said in answer to this:

"I have been authorized to state to you that the Company takes the position that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union. The Company's position throughout the recent negotiations and in previous sessions with you and the Union, has been that the question of granting a wage in-
102 crease concerns our competitive bidding for jobs to keep the plant operating.

"We have endeavored to point out to you that the average wage of Truitt Manufacturing Co. is already higher than the average wage of all our competitors in this area. We have stated many, many times that in bidding for contract work, our bids must be made on the basis of what the labor will cost to perform these jobs and that we simply cannot get the work if our labor costs used in our estimates are higher than those of our competitors. The Union committee has persistently ignored our comparative rates, has made no answer to our exhibits of how we compare with our competitors, and has continued to ask for higher pay, on the grounds that the employees need it, and that we are under the general average of the 'Industry', which you apparently define as being all steel plants in the United States.

"We will be glad at any time to show you our books and records regarding the wages we pay to our employees whom you represent although we think you have this information already."

In reply to this letter the union under date of September 14, 1953, wrote a letter repeating its demand in the following language:

"If the Company still contends that it cannot afford to grant the wage increase of ten cents (10c) per hour requested by the

Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including bonafide evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs."

103 It was failure to comply with these demands which the Trial Examiner and the Board held to be refusal to bargain in good faith. The basis of the conclusion by the Examiner was stated by him as follows: "An employer cannot refuse a demanded wage increase on the grounds that such increase would put him out of a competitive position, even though he were paying the prevailing area wage scale, unless he factually documents this conclusion." The Board refused to adopt this holding of the Trial Examiner but held that: "When an employer seeks to justify the refusal of a wage increase upon an economic basis, as did the Respondent herein, good faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof." The Board was, of course, clearly right in rejecting the holding of the Trial Examiner. We think it equally clear that the Board was wrong in holding that good faith bargaining under the act requires that an employer substantiate its economic position by submitting its books for examination by the union with which it is bargaining.

One of the first decisions upholding the statutory requirement of collective bargaining was the decision of this court in Virginia Ry. Co. v. System Federation No. 40, 4 Cir. 84 F. 2d 641, aff'd 300 U. S. 515. In upholding a mandatory injunction requiring the parties to bargain collectively under the terms of the Railway Labor Act, we said:

"We think it clear that the act of 1934 did more than express a pious hope on the part of Congress that the carriers would deal with the representatives which their employees might choose. In providing that 'the carrier shall treat with the representative so certified [by the Mediation Board] as the representative of the craft or class for the purposes of this Act [chapter]' (45 USCA 152 (ninth)), it created a legal right on the part of the employees to have the carrier recognize and treat with their chosen

104 representatives for the purpose of collective bargaining and a corresponding duty on the part of the carrier to recognize and treat with such representatives, so that the purposes of the act might not be nullified by the carrier's refusing to recognize a representative selected by its employees and certified as such by the Mediation Board. And it is no objection to this view that the parties are not bound to agree even though they may treat. The representatives of the employees, as above pointed out, have im-

portant functions to perform under the act, which they can perform only if the railroad recognizes and treats with them as representing the employees; and while negotiation may not result in agreement, this is no reason why the carrier should arbitrarily refuse to negotiate with those whom its employees have chosen to represent them in negotiations. In collective bargaining, it may be that negotiation will not result in agreement, but it is certain that there will be no agreement without negotiation."

And we upheld the validity of the requirement, which was attacked under the Fifth Amendment, on the ground that what was required was negotiation, not agreement. With respect to this, we said:

"The act does not require of the carrier the making of any agreement. It does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The requirement that the carrier recognize and treat with the chosen representatives of the employees is but an attempt to 'facilitate the amicable settlements of disputes which threaten the service of the necessary agencies of interstate transportation,' as approved by the Supreme Court in the Railway & S. S. Clerks Case.

"It is argued that, as the carrier may refuse to contract
105 with the representatives of the employees, it may refuse to treat with them with a view of contracting, and that, at all events, a requirement to treat is but a vain thing if treaty does not result in contract. As pointed out above, however, the representatives of the employees have many duties to perform under the act looking to the settlement of disputes and the avoidance of industrial conflict, other than the making of contracts; and it is important that their status be determined to the end that these duties may be properly performed, and that the carrier cooperate with them in performing such duties. We cannot see anything arbitrary or unreasonable in requiring that the carrier recognize the representatives of its employees and treat with them as such; and we do not understand on what theory the carrier can be said to be deprived of liberty or property by such requirement. It is but a reasonable regulation in aid of collective bargaining, which, as said by the Supreme Court, in the Railway & S. S. Clerks Case, Congress has chosen to promote as an instrument of industrial peace."

That the National Labor Relations Act did not require agreement but merely good faith bargaining was elaborated by this court with a discussion of what was meant by good faith bargaining in the latter decision of N. L. R. B. v. Highland Park Mfg. Co. 4 Cir. 110 F. 2d 632, 637, where we quoted with approval an opinion of Judge Sibley in the Fifth Circuit dealing with the matter. We said:

"The requirement to bargain collectively is not satisfied by mere discussion of grievances with employees' representatives. It contemplates the making of agreements between employer and employee which will serve as a working basis for the carrying on of the relationship. The act, it is true, does not require that the parties agree; but it does require that they negotiate
106 in good faith with the view of reaching an agreement if possible; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement with them, even as to matters as to which there is no disagreement, does not satisfy its provisions. 'The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining'. Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 236, 59 S. Ct. 206, 220, 83 L. Ed. 126. 'The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made'. National Labor Rlations Board v. Sands Mfg. Co., 306 U. S. 332, 342, 69 S. Ct. 508, 513, 83 L. Ed. 682.

"The duty imposed by the statute was well expressed by Judge Sibley, speaking for the Circuit Court of Appeals of the 5th Circuit in Globe Cotton Mills v. National Labor Relations Board, 5 Cir., 103 F. 2d 91, 94, as follows: 'We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances.'"

What was implicit in these opinions was expressly set forth in the Labor Management Relations Act of 1947, section 8 (d) 29 USCA 158 (d) of which provides:

"(d) For the purposes of this section, to bargain collec-
107 tively in the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. * * *."

The statute requires good faith bargaining with respect to wages and other matters affecting the terms and conditions of

employment, not with respect to matters which lie within the province of management, such as the financial condition of the company, its manufacturing costs or the payment of dividends. And we do not think that merely because the company has objected to a proposed wage rate on the ground that it cannot afford to pay it, good faith bargaining requires it to open up its books to the union in an effort to sustain the ground that it has taken. If such were held to be the law, demand for examination of books could be used as a club to force employers to agree to an unjustified wage rate rather than disclose their financial condition with such confidential matters as manufacturing costs, which could conceivably be used to their great damage. To bargain in good faith does not mean that the bargainor must substantiate by proof statements made by him in the course of the bargaining. It means merely that he bargain with a sincere desire to reach an agreement. There can be no question but that the company here was bargaining in that spirit.

It is to be noted that the statute expressly provides that neither party is under obligation to make any "concession" in connection with the bargaining; but, if the position of the Board here is
108 sustained, it will result that every employer who resists a wage increase on economic grounds must make the concession of opening up his books and disclosing to the union not only his general financial condition, but such highly confidential matters as manufacturing costs. We feel sure that it was never intended that the employer be required to disclose such information to its employees as an incident of collective bargaining; and we feel equally sure that Congress never would have passed a statute which it thought could have been given such interpretation. It might be appropriate to require the furnishing of such information to a labor court with power to fix wages, but not to those who are bargaining at arm's length and who would be under no obligation to act upon the information if received.

There is nothing in our decision in N. L. R. B. v. Whitin Machine Works, 4 Cir. 217 F. 2d 593 which supports the order of the Board. That case had to do with furnishing information as to wages paid the employees, information which the company here offered to furnish, not with dividends, manufacturing costs or the general financial condition of the employer. The information there required to be furnished related to matters with which bargaining was properly concerned. The information here asked relates to matters altogether in the province of management, which were not the proper subject of bargaining. The decision of the Court of Appeals of the 2nd Circuit in N. L. R. B.

v. Yawman & Erbe Mfg. Co., 2 Cir. 187 F. 2d 947 is distinguishable on the same ground.

The Board relies particularly on the decision of the 2nd Circuit in N. L. R. B. v. Jacobs Mfg. Co., 2 Cir. 196 F. 2d 680. In that case, however, it appears that the employer had refused to meet and negotiate with the union, after an initial meeting at which it had stated that it could not afford a wage raise and did not consider certain other matters subject to change under the collective bargaining agreement then in effect. The unfair labor
109 practice there consisted in the refusal to bargain at all, and the order of the Board was entered to redress that practice. It is to be noted that, even as an order redressing what was unquestionably an unfair practice in refusing to bargain, it did not go so far as the demand made by the union here. The opinion in that case states that "the Board's order does not require the respondent to produce any specific books and records but information to 'substantiate' its position in 'bargaining with the union' ". The opinion seems to say that, in the absence of refusal to bargain such as was there involved, there is no obligation on the part of the employer to substantiate by its record the position it has taken, for it contains the categorical statement: "To bargain collectively in compliance with the statute does not mean that an employer must produce proof to establish that he is right in his business decision as to what he can or cannot afford to do". If other language in the opinion seems to support the position here taken by the Board, we cannot accept it as a correct statement of the law.

Our conclusion is that failure to comply with the demand to furnish to the bargaining union the information here demanded did not establish bad faith in the bargaining, in which the employer here was admittedly engaged, and that there was no basis for the Board's finding of an unfair labor practice. The petition for enforcement must accordingly be denied and the order of the Board set aside.

Enforcement Denied and Order Set Aside.

111 In United States Court of Appeals for the Fourth Circuit

No. 6989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

TRUITT MANUFACTURING CO., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decree

Entered July 30, 1955

[File endorsement omitted.]

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Truitt Manufacturing Co. on the 15th day of November 1954, in a proceeding before the said Board numbered 11–CA–670, entitled "Truitt Manufacturing Co. and Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A. F. L."; upon the answer of the respondent; upon the transcript of the record in said proceeding, certified and filed in this court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the petition for enforcement in this cause be, and it is hereby, denied, and that the said order of the National Labor Relations Board be, and it is hereby, set aside.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.
MORRIS A. SOPER,
United States Circuit Judge.
ARMISTEAD M. DOBIE,
United States Circuit Judge.

112 *Stipulation re record*

(Omitted in printing)

113 [Clerk's certificate to foregoing transcript omitted in printing.]

No. 486, October Term, 1955

Order allowing certiorari

Filed December 12, 1955

[Title omitted.]

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1956

No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUITT MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[illegible]
Solicitor General,
[illegible]
Department of Justice,
Washington 25, D. C.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
DOMINICK L. MANOLI,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUITT MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on July 30, 1955, denying the Board's petition for enforcement of its order against Truitt Manufacturing Company.

OPINIONS BELOW

The opinion of the court below (App. A, *infra*, pp. 14-27) is reported at 224 F. 2d 869. The findings of fact, conclusions of law, and order of the Board (B.A. 27-57, 63-67)[1] are reported at 110 NLRB 856.

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[1] References designated "B.A." are to the appendix to the Board's brief filed in the court below.

JURISDICTION

The judgment of the court below was entered on July 30, 1955 (App. A, pp. 27-28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer who, in the course of collective bargaining negotiations, claims inability to pay a requested wage increase must, in order to fulfill the bargaining requirement imposed on him by Section 8(a)(5) of the Act, furnish the union upon its request with the financial data upon which the claim is based.

STATUTE INVOLVED

The statutory provision principally involved, Section 8(a)(5) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), appears in Appendix B, *infra* pp. 28-29.

STATEMENT

1. *The facts.*—In the summer of 1953, Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A.F.L., hereafter called the Union, invoked the reopening provision of its existing contract with Truitt in order to begin negotiations with respect to a wage increase (B.A. 30; 1). The parties first met on August 4, and the union representatives requested that wages be raised a minimum of 10¢ an hour (B.A. 30; 8). Truitt's representatives refused to agree to more than a 2½¢

increase, stating "that would be all that [they] would be able to give at this time . . . that if they would give more . . . it would put them out of business or put them out of competition of getting business with other competitors" (B.A. 49; 8, 9). The president of Truitt, who attended the meeting, added that "the Company had never paid dividends, [was] undercapitalized, . . . didn't have working capital, and to grant more than the 2½¢ at this time would simply put [it] out of business" (B.A. 50; 16). No agreement was reached, and the meeting ended.

On August 7 the parties met again. The Union reported that the employees had rejected the proposed 2½¢ increase, but Truitt refused to increase the offer (B.A. 34; 9). No further headway was made, and as a result of the impasse the Union conducted a strike, from August 10 to 17, in support of its wage demand (*ibid.*). Immediately following the strike Truitt put into effect the 2½¢ increase it had offered (B.A. 14). On September 2, 1953, the Union wrote Truitt that it still held the "belief [that] your Company can meet the Union's request of ten cents (10¢) per hour general increase" (B.A. 2). The letter further stated (*ibid.*):

> Representatives for the * * * Company have claimed, during our lengthy negotiations, the inability to grant an increase in excess of two and one-half (2½¢) cents per hour, therefore, Shopmen's Local Union No. 729 respectfully

> requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal. . . .

Truitt wrote in reply that it took "the position that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union" (B.A. 3). It also reiterated that its refusal to grant the requested increase was based on its fear that it could not obtain work contracts "if our labor costs used in our estimates are higher than those of our competitors" (*ibid.*).

The foregoing letters were followed by another exchange of correspondence between the parties in which each elaborated its position. Thus, in a letter to Truitt dated September 14, 1953, the Union wrote (B.A. 5-6):

> The Union does not contend that the financial affairs of the Company are subject to collective bargaining. It does contend, however, that the Company should submit full and complete information with respect to its financial standing and profits during the past few years in order that the Committee as well as other members of the Union employed by the Company, can intelligently decide whether or not they should continue to press their request for a general increase of ten cents (10¢) per hour. Such financial information is per-

> tinent to collective bargaining. Failure on the part of the Company to furnish such information has the effect of erecting an insurmountable barrier to a successful conclusion of the bargaining.
>
> * * * * * *
>
> If the Company still contends that it cannot afford to grant the wage increase of ten cents (10¢) per hour requested by the Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including bona fide evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs.

In its reply Truitt restated its position "that the financial status of the company and the information which you have requested . . . is not pertinent to this discussion and the company declines to give you such information; you have no legal right to such" (B.A. 7).

One further meeting between the parties was held in the fall of 1953, at which time Truitt persuaded the Union to postpone further negotiations until the first of the following year in order to permit the Company to determine whether it would realize overhead savings from new operating procedures which it had effected (B. A. 40-41; 10-11). As a result, the parties met on three final occasions

in January and February of 1954, but no agreement was reached. Truitt offered an additional but provisional 2½¢ increase, which it shortly thereafter withdrew, claiming that because of "competitive business" it "just couldn't afford" more than it had already granted. (B. A. 42; 13, 26). The Union continued to urge the full 10¢ increase, and renewed its request for "proof if the Company was not making money . . . proof to substantiate that claim" (B. A. 42-43; 12). By such proof, the Union stated, it meant "any records or what have you, books, accounting sheets, cost expenditures, what not, anything to back the Company's position that they were unable to give more money" (B. A. 45, 46; 14-16). Truitt's representatives, however, continued to refuse the request on the ground that such records were "none of [the Union's] business" (B. A. 16).

2. *The Board's decision.*—Upon the foregoing facts the Board concluded (B.A. 63-64) that Truitt had sought "to justify the refusal of a wage increase upon an economic basis," and that the Union was therefore entitled, in accordance with the good faith bargaining requirement of the Act, to be furnished with the data upon which the Company purported to rest its claim. In support of its decision the Board cited *National Labor Relations Board* v. *Jacobs Mfg. Co.* 196 F. 2d 680, where the Court of Appeals for the Second Circuit enforced an order of the Board which, as in the present case, required an employer, who refused a wage increase on the claim that he could not afford it, to

supply the Union, upon the latter's request, with "such statistical and other information as will substantiate the [Company's] position of its economic failure to pay the requested wage increase" (B.A. 64-65; see 196 F. 2d at 684).

3. *The decision of the court of appeals.*—The court below denied enforcement of the Board's order. In its view, the financial data which induces an employer to decide that he cannot afford a wage increase "relates to matters altogether in the province of management, which [are] not the proper subject of bargaining" (*infra*, p. 25). The court further observed that "if the position of the Board here is sustained, it will result that every employer who resists a wage increase on economic grounds must make the concession of opening up his books and disclosing to the union not only his general financial condition, but such highly confidential matters as manufacturing costs" (p. 24, *infra*). Accordingly, the court below concluded that the Company in this case "may not be guilty of an unfair labor practice because of refusal to furnish such information to the union" (*infra*, p. 15).

The opinion of the court suggests that the decision of the Second Circuit in the *Jacobs* case, *supra*, p. 6, discussed more fully *infra*, pp. 8-9, might be distinguished from the holding in the instant case on the ground that the employer in *Jacobs*, unlike the employer here, refused to discuss any of the subjects which under the existing contract were appropriate for bargaining. The

opinion adds, however, that "If other language in the opinion [in *Jacobs*] seems to support the position here taken by the Board, we cannot accept it as a correct statement of the law" (*infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Court of Appeals for the Second Circuit in the *Jacobs* case, *supra*. In that case the Board found that the employer had violated Section 8(a)(5) of the Act in two separate respects: (1) it had refused to discuss pension plans with the Union and (2) like the employer in this case, it had refused the union's request that it "furnish the union with any information to support its position that it was financially unable to grant the requested wage increases." 196 F. 2d at 682-683. The Second Circuit treated the two findings of violations independently of each other, and affirmed both. With respect to the refusal of the employer to grant the union the financial data it requested, the Second Circuit, contrary to the views of the court below, reasoned that the Act's bargaining requirement "was not satisfied . . . by the bare assertion of a conclusion made upon facts undisclosed and unavailable to the union which was not acceptable without a presentation of sufficient underlying facts to show, at least, that the conclusion was reached in good faith." *Id.*, at 683. The court in the *Jacobs* case therefore concluded, in contrast with the holding of the court below upon indistinguishable findings of fact, that

the employer had committed an unfair labor practice "when it refused to disclose pertinent facts to show that it had, in good faith, reached its decision that it could not afford to meet the union demands." *Id.*, at 684.

The suggestion in the opinion of the court below that the *Jacobs* case might be distinguished on the ground that "the unfair labor practice there consisted in the refusal to bargain at all" (p. 26, *infra*), while in this case the employer entered into contract negotiations with the Union, is we submit, erroneous. The company had sought to justify its refusal to confer on the ground that it had done everything that could be reasonably expected. Thus, the reasonableness of refusing further meetings turned on the same issue as is involved in this case, namely, whether the company was under a duty to disclose the underlying facts on which it based its assertions of inability to meet the wage demands. Moreover, for a second reason the suggested distinction cannot withstand analysis, for it would attribute validity to an order which purports to remedy an employer's refusal to bargain by requiring him to supply information to the union which, if the court below is correct, the Act itself does not require to be furnished. The assumption, upon which the distinction thus rests, that the Board might properly issue such an order, is plainly incorrect. Cf. *Republic Steel Corporation v. National Labor Relations Board*, 311 U.S. 7; *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 235-236.

2. Resolution of the question whether the Act entitles a bargaining representative in the course of negotiations to the financial data, upon which an employer bases a claim of inability to pay a requested wage increase, is of manifest practical importance in normal collective bargaining relationships, and, accordingly, in the administration of the Act. It is common knowledge that wage demands constitute one of the most frequent issues that arise in bargaining. Indeed, disagreement over wages was an issue in nearly three-fourths of the strikes that occurred in 1954, a figure which corresponds closely with the experience of the last decade.[2] Whenever in these situations the employer's refusal to accede to the union's demand is attributable to a claim of inability to pay, the question raised here is at least potentially present. A clear understanding by the parties of their rights and duties with respect to this important and recurring bargaining issue is essential to a proper working of the collective bargaining process which the Act seeks to foster.

3. The decision of the court below constitutes, in the Board's view, a serious departure from the principle, which is a recognized corollary to the Act's bargaining requirement, that where the relevant facts are "peculiarly within its knowledge" an employer is "obliged to furnish the Union with sufficient information to enable the latter to understand and discuss intelligently the issues

[2] Monthly Labor Review, Vol. 78, No. 5, pp. 540-541 (Bur. of Lab. Stat., Dept. of Labor, 1955).

raised by the [employer] in opposition to the Union's demands." *Southern Saddlery Co.*, 90 NLRB 1205, 1207. This principle has uniformly been applied by the courts to require employers to furnish unions, for their use in negotiations, employee wage and job classification data,[3] seniority information,[4] and time study data.[5] It is no less applicable in the situation here, for an employer who rejects a wage increase on the basis of financial data unavailable to the union thereby shuts off further bargaining on the matter. *Jacobs* case, *supra*. Lacking access to the controlling facts, the union is not in a position to know whether its demands are excessive, and whether the employer's position is taken in good faith; it is deprived of all basis for intelligent discussion. Its only recourse to settle the issue is either to withdraw its demands or to strike, a result which cannot be squared with the statutory concept that wages should be fixed,

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[3] See, *e.g.*, *Boston Herald-Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58 (C.A. 1); *National Labor Relations Board* v. *Yawman & Erbe*, 187 F. 2d 947, 948-949 (C.A. 2); *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied 349 U.S. 905; *National Labor Relations Board* v. *The Item Company*, 220 F. 2d 956 (C.A. 5), certiorari denied, October 10, 1955, No. 216, this Term; *National Labor Relations Board* v. *Hekman Furniture Co.*, 207 F. 2d 561 (C.A. 6); *Aluminum Ore* v. *National Labor Relations Board*, 131 F. 2d 485, 487 (C.A. 7).

[4] *National Labor Relations Board* v. *New Britain Machine Co.*, 210 F. 2d 61 (C.A. 2); *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131 (C.A. 7), certiorari denied, 313 U.S. 595.

[5] *National Labor Relations Board* v. *Otis Elevator Co.*, 208 F. 2d 176 (C.A. 2).

if possible, by joint participation of employer and union through the process of collective bargaining.

Upholding a provision in a Board order similar to that stricken here, the Second Circuit stated in the *Jacobs* case (196 F. 2d at p. 684):

> To bargain collectively in compliance with the statute does not mean that an employer must produce proof to establish that he is right in his business decision as to what he can, or cannot, afford to do. He is left free to decide that himself and, at the end of the bargaining, may agree only insofar as he is willing in the light of all the circumstances. See § 8(d). The Board's order does not require the respondent to produce any specific business books and records but information to "substantiate" its position in "bargaining with the Union." As we interpret this, the requirement of disclosure will be met if the respondent produces whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands.

The observation of the court below that disclosure of "such confidential matters as manufacturing costs . . . could conceivably be used to [an employer's] great damage" (p. 24, *infra*), is not germane to decision in this case. Truitt's refusal to supply the Union the requested information was not predicated on the claim that its divulgence would be harmful, nor was any showing to that effect made before the Board. Accordingly,

the Board had no occasion to pass on the question which such a showing would have presented, and the issue was not properly before the court. Moreover, the opinion of the court below is not limited to situations where the information requested could not be supplied without harming the employer's competitive position. Thus, the court broadly rejects the Board's reasoning, holds that the financial data involved, by its nature, "relates to matters altogether in the province of management," and states, without reference to the effect of the disclosure on the employer, that "the Board was wrong in holding that good faith bargaining under the Act requires that an employer substantiate its economic position . . . " (p. 25, 18, *infra*).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
DUANE BEESON,
Attorney,
National Labor Relations Board.
OCTOBER, 1955.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

TRUITT MANUFACTURING COMPANY, RESPONDENT

On Petition for enforcement of an Order of The National Labor Relations Board

(Argued June 15, 1955. Decided July 30, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

PARKER, Chief Judge:

This is a petition to enforce an order of the National Labor Relations Board which found the Truitt Manufacturing Company guilty of an unfair labor practice in refusing to bargain with a union representing its employees in that, although bargaining with respect to all matters as to which it was asked to bargain, the company refused a request of the union that it allow an accountant to examine its books and records for the purpose of ascertaining whether it was financially able to grant the wage increase demanded by the union. The Board held that because the company had represented in the course of bargaining negotiations that it was not able to pay the wage increase demanded, a refusal to comply with the request of the union amounted to a refusal to bargain in good faith. The company contends that it bargained

in good faith, and that it was not required to disclose to the union, as an incident of such bargaining the books and records showing its financial condition and involving confidential matters such as manufacturing cost which it would be harmful to its business to make public. We think that the position of the company is correct and that it may not be held guilty of an unfair labor practice because of refusal to furnish such information to the union or to allow its books and records to be examined at the union's request.

The facts are that the company had duly recognized the union as the bargaining representative of its employees and had been bargaining with it for a period of three years. In the summer of 1953, the union made demand for a 10 cents per hour increase in wages and representatives of the union and the company met and negotiated with respect to the matter. The company offered a 2½ cents per hour increase and the union called a strike which lasted for a week. After the strike was ended the union renewed its demand for the 10 cents increase, and the company again refused to accede to the demand but granted a 2½ cents raise, which was put into effect. During the course of these negotiations, the company made statements on a number of occasions to the effect that it could not afford a 10 cents increase, that it was paying wages as high or higher than competitors and that it had lost contracts to lower bidders because of bids based on the wages that it was paying. The union asked to see its books and records in substantiation of

these statements. The company offered to produce all records relating to bids and wages paid but refused to permit examination of its books and records with respect to other matters. The letters of the union making the first demand was a letter of September 2, 1953, which contained the following paragraph:

> "Representatives for the Truitt Mfg. Company have claimed, during our lengthy negotiations, the inability to grant an increase in excess of two and one-half (.02½c) cents per hour, therefore Shopmen's Local Union No. 729 respectfully requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal and/or counter proposals of a wage increase in excess of two and one-half (.02½c) cents per hour."

Counsel for the company in a letter of September 4, 1953, said in answer to this:

> "I have been authorized to state to you that the Company takes the position that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union. The Company's position throughout the recent negotiations and in previous sessions with you and the Union, has been that the question of granting a wage increase concerns our com-

petitive bidding for jobs to keep the plant operating.

"We have endeavored to point out to you that the average wage of Truitt Manufacturing Co. is already higher than the average wage of all our competitors in this area. We have stated many, many times that in bidding for contract work, our bids must be made on the basis of what the labor will cost to perform these jobs and that we simply cannot get the work if our labor costs used in our estimates are higher than those of our competitors. The Union committee has persistently ignored our comparative rates, has made no answer to our exhibits of how we compare with our competitors, and has continued to ask for higher pay, on the grounds that the employees need it, and that we are under the general average of the 'Industry', which you apparently define as being all steel plants in the United States.

"We will be glad at any time to show you our books and records regarding the wages we pay to our employees whom you represent, although we think you have this information already."

In reply to this letter the union under date of September 14, 1953, wrote a letter repeating its demand in the following language:

"If the Company still contends that it cannot afford to grant the wage increase of ten

cents (10c) per hour requested by the Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including bonafide evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs."

It was failure to comply with these demands which the Trial Examiner and the Board held to be refusal to bargain in good faith. The basis of the conclusion by the Examiner was stated by him as follows: "An employer cannot refuse a demanded wage increase on the grounds that such increase would put him out of a competitive position, even though he were paying the prevailing area wage scale, unless he factually documents this conclusion." The Board refused to adopt this holding of the Trial Examiner but held that: "When an employer seeks to justify the refusal of a wage increase upon an economic basis, as did the Respondent herein, good faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof." The Board was, of course, clearly right in rejecting the holding of the Trial Examiner. We think it equally clear that the Board was wrong in holding that good faith bargaining under the act requires that an employer substantiate its economic position by submitting its books for examination by the union with which it is bargaining.

One of the first decisions upholding the statutory requirement of collective bargaining was the decision of this court in *Virginia Ry. Co.* v. *System Federation No. 40*, 4 Cir. 84 F. 2d 641, aff'd 300 U. S. 515. In upholding a mandatory injunction requiring the parties to bargain collectively under the terms of the Railway Labor Act, we said:

> "We think it clear that the act of 1934 did more than express a pious hope on the part of Congress that the carriers would deal with the representatives which their employees might choose. In providing that 'the carrier shall treat with the representative so certified [by the Mediation Board] as the representative of the craft or class for the purposes of this Act [chapter]' (45 USCA 152 (ninth), it created a legal right on the part of the employees to have the carrier recognize and treat with their chosen representatives for the purpose of collective bargaining and a corresponding duty on the part of the carrier to recognize and treat with such representatives, so that the purposes of the act might not be nullified by the carrier's refusing to recognize a representative selected by its employees and certified as such by the Mediation Board. And it is no objection to this view that the parties are not bound to agree even though they may treat. The representatives of the employees, as above pointed out, have important functions to perform under the act, which they can perform only if the railroad recognizes and treats with

them as representing the employees; and while negotiation may not result in agreement, this is no reason why the carrier should arbitrarily refuse to negotiate with those whom its employees have chosen to represent them in negotiations. In collective bargaining, it may be that negotiation will not result in agreement, but it is certain that there will be no agreement without negotiation."

And we upheld the validity of the requirement, which was attacked under the Fifth Amendment, on the ground that what was required was negotiation, not agreement. With respect to this, we said:

"The act does not require of the carrier the making of any agreement. It does not interfere with the normal exercise of the the right of the carrier to select its employees or to discharge them. The requirement that the carrier recognize and treat with the chosen representatives of the employees is but an attempt to 'facilitate the amicable settlements of disputes which threaten the service of the necessary agencies of interstate transportation,' as approved by the Supreme Court in the Railway & S. S. Clerks Case.

"It is argued that, as the carrier may refuse to contract with the representatives of the employees, it may refuse to treat with them with a view of contracting, and that, at all events, a requirement to treat is but a vain thing if

treaty does not result in contract. As pointed out above, however, the representatives of the employees have many duties to perform under the act looking to the settlement of disputes and the avoidance of industrial conflict, other than the making of contracts; and it is important that their status be determined to the end that these duties may be properly performed, and that the carrier co-operate with them in performing such duties. We cannot see anything arbitrary or unreasonable in requiring that the carrier recognize the representatives of its employees and treat with them as such; and we do not understand on what theory the carrier can be said to be deprived of liberty or property by such requirement. It is but a reasonable regulation in aid of collective bargaining, which, as said by the Supreme Court, in the Railway & S. S. Clerks Case, Congress has chosen to promote as an instrument of industrial peace."

That the National Labor Relations Act did not require agreement but merely good faith bargaining was elaborated by this court with a discussion of what was meant by good faith bargaining in the latter decision of *N.L.R.B.* v. *Highland Park Mfg. Co.* 4 Cir. 110 F. 2d 632, 637, where we quoted with approval an opinion of Judge Sibley in the Fifth Circuit dealing with the matter. We said:

"The requirement to bargain collectively is not satisfied by mere discussion of grievances

with employees' representatives. It contemplates the making of agreements between employer and employee which will serve as a working basis for the carrying on of the relationship. The act, it is true, does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement with them, even as to matters as to which there is no disagreement, does not satisfy its provisions. 'The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining.' *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 236, 59 S. Ct. 206, 220, 83 L. Ed. 126. 'The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made.' *National Labor Relations Board* v. *Sands Mfg. Co.,* 306 U.S. 332, 342, 69 S. Ct. 508, 513, 83 L. Ed. 682.

"The duty imposed by the statute was well expressed by Judge Sibley, speaking for the Circuit Court of Appeals of the 5th Circuit in *Globe Cotton Mills* v. *National Labor Relations Board,* 5 Cir., 103 F. 2d 91, 94, as follows:

> 'We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor, and if found to embody it in a contract as specific as possible, which shall stand as a mutual guaranty of conduct, and as a guide for the adjustment of grievances.' "

What was implicit in these opinions was expressly set forth in the Labor Management Relations Act of 1947, section 8(d) 29 USCA 158(d) of which provides:

> "(d) For the purposes of this section, to bargain collectively in the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. * * * "

The statute requires good faith bargaining with respect to wages and other matters affecting the terms and conditions of employment, not with respect to matters which lie within the province of

management, such as the financial condition of the company, its manufacturing costs or the payment of dividends. And we do not think that merely because the company has objected to a proposed wage rate on the ground that it cannot afford to pay it, good faith bargaining requires it to open up its books to the union in an effort to sustain the ground that it has taken. If such were held to be the law, demand for examination of books could be used as a club to force employers to agree to an unjustified wage rate rather than disclose their financial condition with such confidential matters as manufacturing costs, which could conceivably be used to their great damage. To bargain in good faith does not mean that the bargainor must substantiate by proof statements made by him in the course of the bargaining. It means merely that he bargain with a sincere desire to reach an agreement. There can be no question but that the company here was bargaining in that spirit.

It is to be noted that the statute expressly provides that neither party is under obligation to make any "concession" in connection with the bargaining; but, if the position of the Board here is sustained, it will result that every employer who resists a wage increase on economic grounds must make the concession of opening up his books and disclosing to the union not only his general financial condition, but such highly confidential matters as manufacturing costs. We feel sure that it was never intended that the employer be required to disclose such information to its employees as an incident of collective bargaining, and we feel

equally sure that Congress never would have passed a statute which it thought could have been given such interpretation. It might be appropriate to require the furnishing of such information to a labor court with power to fix wages, but not to those who are bargaining at arm's length and who would be under no obligation to act upon the information if received.

There is nothing in our decision in *N.L.R.B.* v. *Whitin Machine Works*, 4 Cir. 217 F. 2d 593 which supports the order of the Board. That case had to do with furnishing information as to wages paid the employees, information which the company here offered to furnish, not with dividends, manufacturing costs or the general financial condition of the employer. The information there required to be furnished related to matters with which bargaining was properly concerned. The information here asked relates to matters altogether in the province of management, which were not the proper subject of bargaining. The decision of the Court of Appeals of the 2nd Circuit in *N.L.R.B.* v. *Yawman & Erbe Mfg. Co.*, 2 Cir. 187 F. 2d 947 is distinguishable on the same ground.

The Board relies particularly on the decision of the 2nd Circuit in *N.L.R.B.* v. *Jacobs Mfg. Co.*, 2 Cir. 196 F. 2d 680. In that case however, it appears that the employer had refused to meet and negotiate with the union, after an initial meeting at which it had stated that it could not afford a wage raise and did not consider certain other matters subject to change under the collective bar-

gaining agreement then in effect. The unfair labor practice there consisted in the refusal to bargain at all; and the order of the Board was entered to redress that practice. It is to be noted that, even as an order redressing what was unquestionably an unfair practice in refusing to bargain, it did not go so far as the demand made by the union here. The opinion in that case states that "the Board's order does not require the respondent to produce any specific books and records but information to 'substantiate' its position in 'bargaining with the union' ". The opinion seems to say that, in the absence of refusal to bargain such as was there involved, there is no obligation on the part of the employer to substantiate by its record the position it has taken, for it contains the categorical statement: "To bargain collectively in compliance with the statute does not mean that an employer must produce proof to establish that he is right in his business decision as to what he can or cannot afford to do". If other language in the opinion seems to support the position here taken by the Board, we cannot accept it as a correct statement of the law.

Our conclusion is that failure to comply with the demand to furnish to the bargaining union the information here demanded did not establish bad faith in the bargaining, in which the employer here was admittedly engaged, and that there was no basis for the Board's finding of an unfair labor practice. The petition for enforcement must ac-

cordingly be denied and the order of the Board set aside.

Enforcement Denied and Order Set Aside.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

TRUITT MANUFACTURING CO., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Truitt Manufacturing Co. on the 15th day of November, 1954, in a proceeding before the said Board numbered 11-CA-670, entitled "Truitt Manufacturing Co. and Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A.F.L."; upon the answer of the respondent; upon the transcript of the record in said proceeding, certified and filed in this court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the petition

for enforcement in this cause be, and it is hereby, denied, and that the said order of the National Labor Relations Board be, and it is hereby set aside.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.
MORRIS A. SOPER,
United States Circuit Judge.
ARMISTEAD M. DOBIE,
United States Circuit Judge.

Filed: JULY 30, 1955.

R. M. F. WILLIAMS, JR.,
Clerk.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of

the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *.

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No. 486

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUETT MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 95–102) is reported at 224 F. 2d 869. The findings of fact, conclusions of law, and order of the Board (R. 27–57, 63–67) are reported at 110 NLRB 856.

JURISDICTION

The judgment of the court below was entered on July 30, 1955 (R. 103). The petition for a writ of certiorari was filed on October 24, 1955, and granted on December 12, 1955 (R. 104). The jurisdiction of this Court rests on 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer who, in the course of collective bargaining negotiations, claims inability to pay a requested wage increase must, in order to fulfill the good faith bargaining requirement imposed on him by Section 8 (a) (5) of the Act, furnish the union, upon its request, with the financial data upon which the claim is based.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).
>
> * * * * *
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not

compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

1. *The facts.*—In the summer of 1953, Shopmen's Local No. 729, International Association of Bridge, Structural and Ornamental Ironworkers of America, A. F. L., hereafter called the Union, invoked the reopening provision of its existing contract with Truitt Manufacturing Company in order to begin negotiations with respect to a wage increase (R. 30; 1). The parties first met on August 4, and the union representatives requested that wages be raised a minimum of 10¢ an hour (R. 30; 8). Truitt's representatives refused to agree to more than a 2½¢ increase, stating "that would be all that [they] would be able to give at this time * * * that if they would give more * * * it would put them out of business or put them out of competition of getting business with other competitors" (R. 49; 8, 9). The president of Truitt, who attended the meeting, added that "the Company had never paid dividends, [was] undercapitalized, * * * didn't have working capital, and to grant more than 2½¢ at this time would simply put [it] out of business" (R. 50; 16). He further stated that to give the requested increase "would break the company up" (R. 50; 17). No agreement was reached, and the meeting ended.

On August 7 the parties met again. The Union reported that the employees had rejected the proposed 2½¢ increase, but Truitt refused to increase the offer (R. 34; 9). No further headway was made, and as a result of the impasse the Union conducted a strike, from August 10 to 17, in support of its wage demand (*ibid.*). Immediately following the strike Truitt put into effect the 2½¢ increase it had offered (R. 14). On September 2, 1953, the Union wrote Truitt that it still held the "belief [that] your Company can meet the Union's request of ten cents (10¢) per hour general increase" (R. 2). The letter further stated (*ibid.*):

> Representatives for the * * * Company have claimed, during our lengthy negotiations, the inability to grant an increase in excess of two and one-half (2½¢) cents per hour, therefore, Shopmen's Local Union No. 729 respectfully requests permission to have a certified public accountant examine such books, records, financial data, etc. to ascertain or substantiate the Company's position or claim of being unable to meet the Union's proposal. * * *

Truitt wrote in reply that it took "the position that confidential financial information concerning the affairs of this Company is not a matter of bargaining or discussing with the Union" (R. 3). It also reiterated that its refusal to grant the requested increase was based on its fear that it could not obtain work contracts "if our labor

costs used in our estimates are higher than those of our competitors" (*ibid.*).

The foregoing letters were followed by another exchange of correspondence between the parties in which each elaborated its position. Thus, in a letter to Truitt dated September 14, 1953, the Union wrote (R. 5–6):

> The Union does not contend that the financial affairs of the Company are subject to collective bargaining. It does contend, however, that the Company should submit full and complete information with respect to its financial standing and profits during the past few years in order that the Committee, as well as other members of the Union employed by the Company, can intelligently decide whether or not they should continue to press their request for a general increase of ten cents (10¢) per hour. Such financial information is pertinent to collective bargaining. Failure on the part of the Company to furnish such information has the effect of erecting an insurmountable barrier to a successful conclusion of the bargaining.
>
> * * * * *
>
> If the Company still contends that it cannot afford to grant the wage increase of ten cents (10¢) per hour requested by the Union, we respectfully request that the Company submit full and complete information and evidence of its financial status to substantiate its claim, including

> bona fide evidence as to dividends paid by the Company during the past ten (10) years and the breakdown of its manufacturing costs.

In its reply Truitt restated its position "that the financial status of the company and the information which you have requested * * * is not pertinent to this discussion and the company declines to give you such information; you have no legal right to such" (R. 7).

One further meeting between the parties was held in the fall of 1953, at which time Truitt persuaded the Union to postpone further negotiations until the early part of the following year in order to permit the Company to determine whether it would realize overhead savings from new operating procedures which it had effected (R. 40–41; 10–11). Following payment by the Company of the largest Christmas bonus it had granted in recent years (R. 26–27), the parties met on three final occasions in January and February of 1954, but no agreement was reached. Truitt offered an additional but provisional 2½¢ increase, but withdrew the offer shortly thereafter, claiming that because of "competitive business" it "just couldn't afford" more than it had already granted (R. 42; 13, 26). The Union continued to urge the full 10¢ increase, and renewed its request for "proof if the Company was not making money * * * proof to substantiate that claim" (R. 42–43; 12). By such proof, the Union stated,

it meant "any records or what have you, books, accounting sheets, cost expenditures, what not, anything to back the Company's position that they were unable to give more money" (R. 45, 46; 14–16). Truitt's representatives, however, continued to refuse the request on the ground that such records were "none of [the Union's] business" (R. 16).

2. *The Board's decision.*—Upon the foregoing facts the Board unanimously concluded that the Company had sought "to justify the refusal of a wage increase upon an economic basis," and that the Union was therefore entitled, in accordance with the good faith bargaining requirement of the Act, to be shown the records and other data upon which the Company purported to rest its claim. The Board therefore found that the Company's refusal to produce such information upon the Union's request constituted an unfair labor practice (R. 63–64).

Accordingly, the Board ordered the Company to cease and desist from refusing to bargain collectively with the Union, or from in any other manner interfering with the efforts of the Union to bargain collectively on behalf of the Company's employees; affirmatively, the Board's order requires the Company to bargain collectively with the Union, and upon request, to furnish the Union with "such statistical and other information as will substantiate the [Company's] posi-

tion of its economic inability to pay the requested wage increase" (R. 64–65).

3. *The decision of the court of appeals.*—The court below denied enforcement of the Board's order. In its view, the financial data which induces an employer to decide that he cannot afford a wage increase "relates to matters altogether in the province of management, which [are] not the proper subject of bargaining" (R. 101). The court further observed that "if the position of the Board here is sustained, it will result that every employer who resists a wage increase on economic grounds must make the concession of opening up his books and disclosing to the union not only his general financial condition, but such highly confidential matters as manufacturing costs" (*ibid.*). Accordingly, the court below concluded that the Company in this case "may not be guilty of an unfair labor practice because of refusal to furnish such information to the union" (R. 96).

SUMMARY OF ARGUMENT

The duty to bargain in good faith has been uniformly held to embrace the duty to supply information relevant to the bargaining issues. This general principle is particularly applicable in the instant case, for if employers who plead financial inability to grant a union request may withhold the information on which they rely, an employer who simply avows his financial inability can erect virtually an insurmountable barrier to

successful conclusion of the bargaining. The employer's refusal to document his bare assertion of financial inability compels the union to negotiate in the dark, unable to determine whether to adhere to, modify, or abandon its request. Conversely, requiring the production of such financial data aids the bargaining process by enabling the employees' representative to make intelligent demands commensurate with the economic realities of the situation. Experience demonstrates, as the Board and students in labor relations recognize, that production of such data furthers industrial peace and good faith negotiations, thereby accomplishing the primary purpose of the Act.

The employer in this case, who had refused to grant a union request claiming financial inability to meet it, was therefore under a duty to supply the Union, at its request, with the financial data on which the employer relied. This duty was not sufficiently met by offering to disclose the comparative wage scales of respondent and its principal competitors because the refusal of the increase was bottomed on the Company's own financial condition. Moreover, the statement that the Company could not grant the increase and still meet competition is merely an alternative way of stating the conclusion that the Company cannot afford the increase; it does not enable the Union to ascertain whether that conclusion was reached in good faith, nor does it

enable the Union intelligently to reconsider its request.

Contrary to the suggestion of the court below, there is no intimation in this case that production of the data on which the Company relies would be harmful to the Company's legitimate business interests. Moreover, the Board's order does not require the production of any specific books and records, but only such information as the Company relies on for its claim of financial inability to meet the Union's request. The Company's refusal to supply the requested information was not predicated on the claim that disclosure of the data would harm the Company and no showing to that effect was made before the Board. Hence, this case does not present any issue as to the disclosure of confidential data which might be injurious to the Company. In any event, the Board has made clear that an employer should not be required to provide information, the furnishing of which would impose an impossible or unreasonable burden upon the employer.

ARGUMENT

WHEN AN EMPLOYER REFUSES A UNION'S REQUEST FOR A WAGE INCREASE, CLAIMING FINANCIAL INABILITY TO GRANT IT, GOOD FAITH BARGAINING REQUIRES THAT HE FURNISH THE UNION, AT ITS REQUEST, THE FINANCIAL DATA ON WHICH HIS CLAIM OF INABILITY RESTS

The basic premise of the National Labor Relations Act, both before and after the 1947 amend-

ments, is that *bona fide* collective bargaining minimizes resort to strikes and other forms of industrial unrest. The theory of the statute is that the national interest is better served if the parties reach agreement by the free exchange of views in bargaining negotiations, than if one party relies on its economic power to compel the other to yield. Section 1 of the Act.

The statutory requirement of good faith bargaining has, therefore, always been understood to mean more than a mere willingness to meet at the bargaining table. As far back as *Globe Cotton Mills* v. *National Labor Relations Board,* 103 F. 2d 91, 94 (C. A. 5), it was recognized that "there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement * * *." Similarly, in *Aluminum Ore Co.* v. *National Labor Relations Board,* 131 F. 2d 485, 487 (C. A. 7), the court recognized that the statute "contemplates exchange of information, ideas and theories in an open discussion and an honest attempt to arrive at an agreement." Accordingly, as this Court stated in *National Labor Relations Board* v. *American National Insurance Co.,* 343 U. S. 395, 402, "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." And, while the statute imposes no duty to reach agreement, or even to make concessions,

the duty to bargain, which it does impose, necessarily embraces the duty to furnish such relevant information as will facilitate compromise and agreement. Cf. the statement in the *American National* case that "the Act does not encourage a party [at the bargaining table] to engage in fruitless marathon discussions at the expense of *frank statement and support* of his position." 343 U. S. at 404, emphasis supplied.

Thus the courts have repeatedly recognized what Judge Magruder has termed the "presumptive relevance" of current wage rates to future bargaining,[1] and have invariably sustained the Board in holding that an employer was guilty of a refusal to bargain when he refused to supply the bargaining representative with the names, wage rates, and similar pertinent data concerning employees in the bargaining unit.[2] The rationale of these decisions is that the bargaining agent must possess adequate information on a matter at issue if it is to take a realistic position and

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[1] *Boston Herald Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58, 62 (C. A. 1).

[2] First Circuit: *Boston Herald, supra;* Second Circuit: *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947; Fourth Circuit: *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593, certiorari denied, 349 U. S. 905; Fifth Circuit: *National Labor Relations Board* v. *The Item Co.*, 220 F. 2d 956, certiorari denied, 350 U. S. 836; Sixth Circuit: *National Labor Relations Board* v. *Hekman Furniture Co.*, 207 F. 2d 561, 562; Seventh Circuit: *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 487.

fulfill its statutory function. This same principle, we submit, applies to the case at bar.

During the course of bargaining negotiations in this case, the Union requested a wage increase which respondent refused to grant on the ground that it was financially unable to meet the Union's demand. When the Union asked for the data upon which respondent predicated its claim of inability, respondent refused to produce it (*supra*, pp. 4–7). This refusal necessarily tended to force the Union to negotiate in the dark. In the circumstances, it would have been difficult for it to determine whether some other wage request on its part would meet with a similar rejection, or whether to make some alternative suggestion which would enable the Company to grant the requested increase. Indeed, the Union, without the information, was hardly in a position to determine whether the Company's claim of financial inability was even put forward in good faith. Moreover, even where the employer is acting in good faith, his refusal to document his position, and his reliance on a bare assertion of financial inability, leaves the union little room for intelligent bargaining. The union can hardly formulate and adjust its demands in the light of economic realities, and there is no real opportunity to achieve the statutory objective "of joint participation and responsibility" in the establishment of wages and other terms of the

bargaining agreement. *National Labor Relations Board* v. *Otis Elevator Co.*, 208 F. 2d 176, 179 (C. A. 2). The union is helpless even to make an informed report to its own members as to the merits of their demands; it cannot weigh the wisdom or the justice of resorting to strike action, and because it cannot intelligently appraise the picture, it is handicapped in carrying out its responsibility to inform and advise the employees whom it represents.

The statutory scheme of resolving economic disputes peacefully through collective bargaining is not served if the union is not in a position to make such a report to the employees whom it represents. For, in the absence of adequate information and explanation, the pressures are for resort to industrial warfare. As the New York State Labor Relations Board observed in a substantially identical situation (*Matter of Court Cafeteria*, 26 LRRM 1207):

> Such unsupported declarations [of financial inability to meet wage demands] gave the Union no basis upon which to evaluate Respondent's assertion or reappraise its own demands. Collective bargaining is not served, indeed it hardly exists, if assertion is resorted to when documentation is readily available.

For these reasons, the Board has held that as part of the duty to bargain collectively, the employer is "obliged to furnish the Union with

sufficient information to enable the latter to understand and discuss intelligently the issues raised by the [employer] in opposition to the Union's demands." *Southern Saddlery Co.*, 90 N. L. R. B. 1205, 1207. Indeed, as early as the first volume of Labor Board reports, the Board observed in the case of an employer who "did no more than take refuge in the assertion that [his] financial condition was poor; [and] he refused either to prove his statement, or to permit independent verification" that "This is not collective bargaining." *Pioneer Pearl Button Co.*, 1 N. L. R. B. 837, 843. And see *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, where the Second Circuit, speaking through Judge Chase, held that where an employer refused to grant a wage increase, claiming financial inability, the Board properly ordered the employer to "produce * * * whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands." 196 F. 2d at 684. Here, as in the *Jacobs* case, the employer, instead of exhibiting "a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments" (196 F. 2d at 683), took refuge in "the bare assertion of a conclusion [financial inability] made upon facts undisclosed and unavailable to the union * * * without a presentation of sufficient underlying facts to

show, at least, that the conclusion was reached in good faith." *Ibid.*

The holding in the *Jacobs* case, like the holding of the New York Labor Board in the *Court Cafeteria* case and the Board's holding here, proceeds from a recognition that any other result would go far to permit employers to frustrate the entire collective bargaining process which the Act seeks to foster by simply resorting to the formula of "can't afford it" for every union request advanced in bargaining negotiations. As the Board stated in the *Southern Saddlery* case, 90 N. L. R. B. at 1207: "The Respondent, by maintaining the intransigent position that it was financially unable to raise wages and, at the same time, by refusing to make any reasonable efforts to support or justify its position, erected an insurmountable barrier to successful conclusion of the bargaining."

In sum, where the employer raises the issue of his ability to pay, it seems fair and proper to require him to substantiate his claim in some manner. Sufficient data should be furnished to enable the union to bargain rationally and to fulfill its statutory function during negotiations. To allow the company to make and stand on a flat assertion without providing any information as to its basis would tend to block the whole collective bargaining process at the very outset. The question of bargaining in bad faith would not even be reached if wages were the only subject of negotiations; there could scarcely be

any bargaining at all. We submit that to permit so easy an evasion of the bargaining obligation would subvert the basic premise of the statute.

Compelling the employer to produce the data upon which he relies for his claim of financial inability to grant a union request also makes an affirmative contribution to the bargaining process. "Use of the * * * substantiating data that management has prepared will not only evidence its intent to bargain in good faith, but will make better negotiations possible." Smith, *Collective Bargaining* (Prentice-Hall, 1946), p. 49.[4] As the Union told the Company in the instant case, without this information the Union could not "intelligently decide whether or not they should continue to press their request for a general increase of ten cents per hour" (R. 5). It is well known that unions have sometimes "made some demands which were 'out of line' * * * due to a lack of information or misinformation on the part of those drafting the union proposal" * * *" Cham-

[3] See Sherman, *Employer's Obligation to Produce Data for Collective Bargaining*, 35 Minn. L. Rev. 24, 35; Daykin, *Furnishing Wage Data for Bargaining*, 4 Labor Law Journal 417, 421.

[4] A study conducted by the University of Chicago of the harmonious bargaining relationship between Studebaker Corporation and the United Automobile Workers concluded that "sharing of information as the basis for decisions" was one of three major factors which "contributed to the stability of the bargaining relationship at Studebaker." Harrison & Dubin, *Patterns of Union-Management Relations* (Science Research Associates, 1947), p. 146.

berlain, *Collective Bargaining* (McGraw-Hill, 1951), p. 89. "Failure to obtain this information may result in a union's making excessive demands based upon emotions or presumed data rather than facts." Smith, *Collective Bargaining* (Prentice-Hall, 1946), p. 38. Experience demonstrates that where the employer has shown the union that its wage demands are not reasonable in the light of actual conditions, unions may adjust their demands to the economic realities.[5] Such good faith negotiations between the parties are not likely to be achieved where an employer refuses to document its asserted financial inability to grant a union request.

That the union's possession of adequate financial data is important to successful wage negotia-

[5] In the hosiery industry "negotiations for a new agreement have become more and more a joint appraisal of a host of facts bearing upon the state of the industry and the wages that can be paid." *How Collective Bargaining Works* (Twentieth Century Fund, 1942), p. 453. In 1954 the employees of the Studebaker Corporation, upon the recommendation of their union, voted in favor of a wage decrease because of their employer's showing during bargaining negotiations that business conditions required such a cut. Daily Labor Report, 156: A4–A5 (Bureau of National Affairs, August 12, 1954). In analogous circumstances, the union representing the employees of Rice-Stix agreed to forego wage increases and other benefits to which they were entitled under an earlier agreement. 35 Labor Relations Reporter 106. See also *What Kind of Information Do Labor Unions Want in Financial Statements?*, 87 Journal of Accountancy 368, 371.

tions has been recognized not only by the Board and students in the field of labor relations,[6] but also by both organized labor and representatives of management. Labor organizations have for some years maintained research staffs to obtain and evaluate such data for the use of negotiators,[7] stating that "without the facts we cannot plan intelligently, we cannot adjust our demands to realities * * *" American Federation of Labor, *Labor's Monthly Survey*, September 1946, pp. 6–7, quoted in Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), p. 91, n. 16.[8] The same source (Chamberlain, p. 89) quotes employer representatives as recognizing the value in wage negotiations of making financial data avail-

[6] See Sherman, *op. cit., supra*, 35 Minn. L. Rev. 24, 35; Chamberlain, *Collective Bargaining Procedures* (American Council of Public Affairs, 1944), pp. 96–98; Miller, *Employer's Duty to Furnish Wage and Economic Data to Unions*, 6 Labor Law Journal 151, 160, 164, 192; *Must Management Inform Labor?*, 3 Stanford L. Rev. 88.

[7] See Pillsbury, *The Use of Corporate Financial Statements and Related Data by Organized Labor* (Indiana Business Report, No. 18) 27–30; Barkin, *Financial Statements in Collective Bargaining*, 4 Labor Law Journal 753.

[8] See also the symposium, *What Kind of Information Do Labor Unions Want in Financial Statements*, 87 Journal of Accountancy 368, 369, 371, where various union leaders emphasize the need to "have the full facts before us in our bargaining" to enable unions "to find out whether the company's claim [of financial inability] is true" and also to enable unions to make demands which "could be considered reasonable and well within the power of the company to grant."

able to the union negotiators.[9] Indeed, from the earliest days of the Wagner Act employers have in effect realized that the duty to bargain in good faith necessarily entails a duty to furnish financial data supporting a claim of inability to grant a wage demand. See, e. g., *Julius Breckwoldt & Son, Inc.*, 9 N. L. R. B. 94, 98; *Ferguson Bros. Mfg. Co.*, 9 N. L. R. B. 189, 194; for a more recent manifestation of the same attitude, see *McLean-Arkansas Lumber Co.*, 109 N. L. R. B. 1022, 1037–1038.[10]

In the instant case, to be sure, the Company submitted to the Union pay rate information as to some of its competitors and also submitted a list of jobs on which it had made unsuccessful

[9] See also Hill & Hook, *Management at the Bargaining Table* (McGraw-Hill, 1945), p. 243; *How Collective Bargaining Works* (Twentieth Century Fund, 1942), p. 453; Greenman, *Getting Along with Unions* (Harpers, 1947), p. 51; Smith, *Collective Bargaining* (Prentice-Hall, 1946), pp. 37–38, 49; Harrison & Dubin, *Patterns of Union-Management Relations* (Science Research Associates, 1947), p. 146.

[10] As stated by Harbison & Coleman, *Working Harmony* (Case Study No. 13 for the National Planning Association Committee on the Causes of Industrial Peace under Collective Bargaining), p. 38:

"Management was usually willing—and often quite anxious—to give the union the facts about the company's economic position. There was, for example, little opposition to letting the union officers look at the company's books. In effect this meant that management believed the union would act in a more responsible manner when it had all the figures on which bargaining might reasonably take place."

bids (R. 41, 43, 48; 11, 14–15, 23). But this information did not comprise the data upon which the Company rested its claim of inability to pay the requested increase. Although there is some evidence that the Company's refusal was based on its unwillingness to pay higher wages than some of its competitors, both the Trial Examiner and the Board found (R. 50, 52–53, 63–64) that the Company also took the position that it was financially unable to meet the Union's demand. This finding, not disturbed by the court below, has ample support in the record. Thus the Company president told the Union that "it would break the Company up to give up that much pay raise, and it would put them in a precarious position" (R. 17), and that "to grant more than the two and a half cents at this time would simply put them out of business" (R. 16). Other Company officials likewise told the Union that the Company "could not afford" to meet the Union's wage demand (R. 19, 10). Indeed at one stage of the negotiations the Company in effect admitted that the wage rates paid by its competitors did not control the Company's refusal to grant the increase, for it asked the Union to postpone its demand until the Company could determine whether new operating procedures were resulting in reduced overhead (*supra*, p. 6).

While the Company emphasized that it rejected the Union's wage request because to grant

it "would put them out of business or put them out of competition of getting business with other competitors" (R. 9), it persistently refused to document this conclusion, and simply restated it in varying ways. It told the Union that "the Company had never paid dividends, [was] undercapitalized, they didn't have working capital, and to grant more than the two-and-a-half cents at this time would simply put them out of business"; that it would not be able to bid successfully on jobs "if our labor costs * * * are higher than those of our competitors"; and "that profit in regard to sales and costs was low, and that the labor cost was high, and the company was struggling under a financial strain, being undercapitalized" (R. 3, 10, 16). The Union, in turn, could not intelligently bargain in this situation without an understanding of the financial data which was claimed by the Company to support its conclusion. Whether the business reasons stated by the Company were *bona fide* might well depend on what a financial report would disclose as to its "profit in regard to sales and costs," its capitalization, and its cost and price structure upon which its competitive bidding was computed. In view of the Company's attitude, this basic information had to be made available before the employees, as the Union explained to the Company, could "intelligently decide whether or not they should continue to press their request for a general increase of ten

cents (10¢) per hour" (*supra*, p. 5). Accordingly, the Company, as a prerequisite to fulfillment of its bargaining obligation, was required to grant the Union's request for "full and complete information and evidence of [the Company's] financial status to substantiate its claim" (*supra*, p. 5). This does not, of course, mean that "an employer must produce proof to establish that he is right in his business decision as to what he can, or cannot, afford to do. He is left free to decide that himself and, at the end of the bargaining, may agree only insofar as he is willing in the light of all the circumstances." *Jacobs* case, *supra*, 196 F. 2d at p. 684.

The Company's suggestion that its refusal to grant the requested increase was premised not on inability to pay but on the competitive wage situation is, as we have just noted (p. 21), contrary to the findings in this case which are supported by the record. Moreover, the distinction which the Company seeks to make does not in reality exist. To say that an increase in wages would result in an ability to bid successfully for jobs simply restates the conclusion that the increase cannot be afforded; it does not supply the data which might show that the conclusion was reached in good faith and thus might enable the Union intelligently to urge a modified request. Even if a distinction could be drawn between the economic basis of inability to pay and the economic basis of inability to bid successfully

for business, the Company could not refuse the Union the information it requested without violating the underlying principle that the "bargaining agent of the employees [is] entitled to information which would enable it to properly and understandingly perform its duties." *National Labor Relations Board* v. *Whitin Machine Works, supra,* 217 F. 2d at 594 (C. A. 4). The Company's claim that a wage increase would drive it out of the competitive market can be appraised only by an examination of profit, cost and other financial data in addition to wage levels.[11]

The observation of the court below (R. 101) that it would be harmful to the employer to require it to disclose "such highly confidential matters as manufacturing costs," is not germane to the decision in this case. The Company's refusal to supply the Union the requested information was not predicated on the claim that to divulge the data would harm the Company, and no showing to that effect was made before the Board. Significantly, none of the sources heretofore cited, including representatives of man-

[11] It is possible, as suggested by some of the Company's statements during negotiations, that high profits are necessary to create a surplus that can be turned back into the business in order to increase capitalization (*supra,* p. 3). Again, however, if this be the reason for the Company's assertion that a wage increase would adversely affect its competitive position, the parties could not intelligently proceed in their negotiations without having access to the data upon which the contention rests.

agement (see especially p. 20, n. 9, *supra*), appears to consider that revelation of the financial data on which the employer rests his bargaining position would entail a risk of disclosing confidential information. In any event, the Board has repeatedly made it clear that the Union is not necessarily entitled to the data in the specific form requested,[12] and that the duty to produce information is "subject, of course, to the qualification that an employer should not be compelled to provide information the furnishing of which would impose an impossible or unreasonable burden."[13] See also the *Jacobs* case, *supra*, where the Second Circuit observed that "The Board's order does not require the respondent to produce any specific business books and records but [merely] * * * whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands." 196 F. 2d at 684.

The court below likewise suggested that to require the employer to produce the data on which he relied for a claim of financial inability to grant a union demand would be to require a "'concession" contrary to the express provisions of Sec-

[12] See *Cincinnati Steel Castings Co.*, 86 N. L. R. B. 592, 593; *Old Line Life Insurance Co.*, 96 N. L. R. B. 499, 502–503, *affirmed*, 200 F. 2d 52 (C. A. 7); *McLean-Arkansas Lumber Co.*, 109 N. L. R. B. 1022, 1037–1038.

[13] *Yawman & Erbe Mfg. Co.*, 89 N. L. R. B. 881, 885 (concurring opinion), enforced, 187 F. 2d 947 (C. A. 2).

tion 8 (d) of the Act (R. 101). That provision, however, is concerned with "the substantive terms of collective bargaining agreements" (see *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 404, 408–409), whereas the instant case concerns not the terms of an agreement but the mechanics of the bargaining itself. An employer, even though he be acting "in good faith" (cf. R. 101), violates his bargaining obligation under the statute if he refuses to produce appropriate wage data relevant to bargaining (cases cited *supra*, p. 12, n. 2), refuses to grant unqualified recognition to the statutory bargaining representative,[14] or refused, even prior to the amended Act, to embody his agreement in writing.[15] The employer is required by statute to make these "concessions" which are a part of the mechanics of collective bargaining, although he remains free in his negotiations to refuse to make any substantive concessions as to terms of employment.

The court below observed that the Company had no duty to come to agreement with the Union, and added that it was not "appropri-

[14] *National Labor Relations Board* v. *Corsicana Cotton Mills*, 178 F. 2d 344, 346–347 (C. A. 5); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 751 (C. A. 7), certiorari denied, 313 U. S. 565.

[15] *Art Metals Const. Co.* v. *National Labor Relations Board*, 110 F. 2d 148, 150 (C. A. 2); see also *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 525–526.

ate to require the furnishing of such information * * * to those * * * who would be under no obligation to act upon the information if received" (R. 101). It is, of course, true that the Company, if it had furnished the requested data to the Union, might have remained unyielding in its opposition to the requested wage increase or that the Union might have adhered to its demands irrespective of the data. But the entire philosophy of collective bargaining presupposes that the parties will act reasonably when in possession of the facts. Thus, the Union might have retreated from its demand when acquainted with the financial data on which the Company relied, or the Union might have been able to persuade the Company that the financial picture warranted accession to the Union's wage request. It may also be true that the Company would be unwilling to grant a wage increase even if it could afford to. But the Company injected the issue of financial inability into the negotiations, and it should therefore document its assertion if bargaining is not to collapse before it is fairly begun. While the production of financial data is no guarantee that the negotiations will lead to agreement, it will at the least permit exploration of the initial obstacle thereto. It may well be true in this case, as in others, that even good faith collective bargaining will not succeed and that a resort to industrial warfare will ensue, but under the statute this should be a last resort, reached only after the

parties have in good faith explored the possibilities of agreement."[16]

In short, the employer's bald, unsupported assertion of "inability to pay" raises an "insurmountable barrier to sucessful conclusion of the bargaining" (*Southern Saddlery,* 90 N. L. R. B. 1205, 1207). The Board's order, requiring the employer to produce the information on which he relies for his claim of financial inability, is an appropriate means of removing this barrier and effectuating the national policy.

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[16] As stated in 87 Journal of Accountancy at 371–372:

"* * * even with all the basic facts available to both parties, there might still be room for a considerable difference of opinion in the interpretation of these facts. That can hardly be avoided, but there is no reason why it should constitute a barrier to ultimate peaceful agreement, if both parties negotiate in good faith. If each is persuaded of the other's sincerity and cooperativeness, differences of opinion can be resolved over the bargaining table, by compromise and a willingness to give due respect to rational arguments. If essential fundamental facts which both parties are willing to use as a basis for discussion are lacking, wage negotiations will all too often settle down into a simple test of relative strength and endurance, regardless of the actual merits of the case."

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the case should be remanded to the court below with directions to enforce the order of the Board.

Respectfuly submitted.

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JANUARY 1956.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 486

NATIONAL LABOR RELATIONS BOARD
Petitioner

vs.

TRUITT MANUFACTURING COMPANY
Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Of The Court Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 224 F2d 869.

Jurisdiction Of This Court

The judgment which the Petitioner seeks to have this Court review was rendered by the United States Court of Appeals for the Fourth Circuit on July 30, 1955 and

was on that date entered upon the records of that Court. The Court of Appeals had jurisdiction to render such judgment by virtue of the provisions of the National Labor Relations Act, Section 10 (e), 29 U. S. C. A. 160 (e).

Jurisdiction in this Court to review the judgment of the Court of Appeals, through the procedure of certiorari, is invoked by the Petitioner under the provisions of 28 U. S. C. A. 1254 and the National Labor Relations Act, Section 10 (e), 29 U. S. C. A. 160 (e).

Question Presented

In negotiation upon a demand for a wage increase, if an employer otherwise and in every other respect bargains in good faith, is it, *as a matter of law*, bad faith for the employer to refuse to furnish the employee representative with "full and complete information" as to the employer's "financial status," "dividends" and "manufacturing costs?"

Statutory Provisions Involved

The provisions of statute here pertinent are—

National Labor Relations Act, Section 8 (a) (5), 61 Stat. 140, 29 U. S. C. A. 158 (a) (5):

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . "

And

National Labor Relations Act, Section 8 (d), 61 Stat. 140, 29 U. S. C. A. 158 (d):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

Statement Of The Case

In 1951, 1952 and 1953 the Respondent negotiated and entered into three successive contracts with the International Association of Bridge, Structural and Ornamental Ironworkers of America, AFL, as representative of Respondent's employees.[1] In the Summer of 1953, although a contract was in effect, the Union, under a clause permitting "reopening" on wage matters only, made demand for a 10c an hour wage increase (Petition p. 2). Representatives of the Company and of the Union met

[1]Unless otherwise indicated all page references are to the appendix to the Respondent's brief filed in the Court below. References to portions of the record printed in the appendix to the Board's brief in the Court below are designated "B. A." Any references to portions of the written transcript not printed in either appendix in the Court below are designated "Tr."

and negotiated with respect to this matter. The Company offered a 2½c an hour increase (Petition p. 2). The Union insisted upon 10c and called the employees out on a strike (Petition p. 3).

After the strike ended, the Union renewed its demand for a 10c an hour increase (Petition p. 3). The Company again refused but proceeded to put into effect the 2½c raise which it had been offering (Petition p. 3).

On September 2 the Union, by letter and for the first time, requested "permission to have a certified public accountant examine (the Company's) books, records, financial data, etc. to ascertain or substantiate the Company's position" (B. A. 2). The Company wrote in reply, reviewing the considerations which had impelled it to refuse the 10c wage increase, and declining to grant the Union access to its "confidential financial information," saying at the same time, however, "we will be glad at any time to show you our books and records regarding the wages we pay to our employees whom you represent, although we think you have this information already." (B. A. 3-4).

Thereupon the Union again wrote the Company, requesting "full and complete information with respect to (the Company's) financial standing and profits during the past few years" and "full and complete information and evidence of (the Company's) financial status to substantiate its claim, including bona fide evidence as to dividends paid by the Company during the past ten years

and the breakdown of its manufacturing costs" (B. A. 5-6). To this the Company replied "our refusal to grant your demanded wage increase was based primarily on what such a raise would do to our competitive position in the industry in this area. The Truitt Company is willing to discuss with you at any time the problem of how our wages compare with those of our competition." The Company again declined to furnish the Union with information as to its "financial status" (B. A. 7).

The Board ruled that such refusal on the part of the Respondent was *per se* and in and of itself a violation of law regardless of whether the Respondent was otherwise bargaining in complete good faith. The Board has never made any contention that there is any fault to be found anywhere in the Respondent's attitude or conduct, save in this one respect (R). Indeed, after the exchange of correspondence outlined above, the parties resumed their bargaining meetings (Tr. 20-23) and later arrived at a settlement of their wage dispute.

With respect to the Respondent's refusal to grant a 10¢ an hour wage increase, it is agreed on all sides that such refusal was based on "economic" considerations. And as the Respondent understands, the Board and the Respondent are in agreement that the ruling on the controversy here at issue should be the same whether the Respondent took the position that because of economic considerations it was *unable* to grant the requested increase, or whether the Respondent took the position that

because of economic considerations it was *unwilling* to grant the requested increase. In either event, the Respondent grounded its position on economic considerations. Nor indeed would it seem that negotiations with respect to wages would ordinarily revolve around anything other than economic considerations.

The economic matter which the Company principally discussed during the negotiations was its fear of getting its wages out of line with those of its competitors. It is undisputed that the Company stated that it was "already paying more than (its) competitors in the area" and that it named several such competitors (2).

The Union's representatives who conducted the negotiations on behalf of the Union, and who were the Board's witnesses at the hearing before the Board's Trial Examiner, testified that "the Company stood firm on its position that (it) was already paying more than (its competitors)" (4); that the Company made "explanation there that if they gave more, then it would put them in a position where they would not be able to get jobs" (4-5) and "would price (the Company) out of competitive bidding" (9, 14); that the Company "gave (the Union) exact names and figures and prices of jobs that (it) had lost because (it) had been underbid" (5, 10); and that the Union never asked for any further substantiation of the Company's contention that "it was already paying more than

its competitors" (4). Similarily, the Company's Vice-President testified (16-17):

> "Q. And what evidence did you offer to show the Union?
>
> A. We had statements from various firms, Peden Steel, Davie Steel, Carolina Steel . . . We had typewritten lists of the wage rates that each was paying and general rough classifications . . . We had evidence to show that we were paying actually higher rates than all but one of these, the one being Carolina Steel, with which we were right on par; and I might add, needless to say, they are our chief competition."

Argument

The situation is one in which the Company, having basically demonstrated its good faith in dealing with the Union, having repeatedly entered into contracts with the Union, and being on the occasion in question engaged in bargaining with respect to a wage increase, (1) offered all its wage records to the Union, (2) offered and gave a part of the requested wage increase, (3) stated that out of economic considerations it would not agree to any further increase, (4) explained that outstanding among such economic considerations was its belief that it was already paying as much or more than its competitors and that if it went further beyond them, it would price itself out of its market, and (5) furnished statistical data and details to corroborate its position that its wages were already as high

In this case the Board does not question that the Respondent had such mind and purpose and made bona fide effort to reach agreement. The Board simply contends that the single fact of Respondent's refusal to furnish its financial records to the Union *negatives all good faith otherwise established and in and of itself convicts* the Respondent of bad faith and failure to bargain.

It has never been the law, however, that adherence to a position taken on any given matter or a particular refusal or insistence constitutes in and of itself bad faith. If this were not sufficiently clear from the basic principle stated above, it is certainly made so by the express and positive provision of the Act that good faith bargaining involves no obligation "to agree to a proposal" or make "a concession."[2] Nevertheless the Board seeks to have this Court rule, directly in the teeth of this provision, that there was, *as a matter of law, an absolute duty* on the part of the Respondent "to agree to a proposal" and make "a concession," namely the drastic proposal and the vital concession of delivering its financial records to the Union.

Congress has in effect said: We require only that the employer and employee representative shall in good faith bargain with each other. By this we do not intend that either shall ever be compelled "to agree to a proposal" or make "a concession."

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[2]National Labor Relations Act, Section 8 (d), 61 Stat. 140, 29 U. S. C. A. 158 (d).

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or higher than its competitors and that it was being underbid by them—and refused only to give the Union "full and complete information" as to its "financial status," "dividends" and "manufacturing costs."

Upon this undisputed state of facts the Board asks the Court below to rule that the information which the Respondent withheld was *absolutely and as a matter of law* essential to good faith bargaining—and that by the Respondent's refusal to furnish such information, the good faith bargaining, which the Respondent was otherwise admittedly engaged in, became necessarily transformed into bad faith bargaining.

The Court below having refused to make such ruling, the Board now seeks to have this Court do so.

Before analyzing the extraordinary implications of the ruling which the Board seeks in this case, the Respondent would call attention to the basic standard which governs the determination of good faith bargaining. The controlling principle has always been that employer and employee representative shall "enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement touching wages, hours and conditions of employment." *Globe Cotton Mills vs. National Labor Relations Board,* 103 F2d 91, 94 (C. A. 5).

The test of failure to bargain is whether in the light of all the facts and circumstances established by the evidence, it is to be seen that such "open and fair mind" and "sincere purpose" to reach agreement have been lacking.

Yet the Board now desires this Court to say: Even though the Respondent has otherwise bargained in complete good faith, nevertheless by refusing to agree to the proposal and make the concession of furnishing its financial records to the Union, automatically the Respondent violated the Congressional enactment.

It is submitted, on the other hand, that the ruling which the Board seeks would violate the positively expressed will of Congress and instead of implementing, would explicitly disobey what Congress has written.

This has been heretofore clearly recognized by this Court. In a case where, as here, the Board contended that the taking of a certain position in bargaining was, *per se*, and as a matter of law, violative of the Statute, this Court said:

> "As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8 (d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession."

> "Accordingly, we reject the Board's holding that bargaining for the management functions clause pro-

posed by Respondent was, *per se*, an unfair labor practice."

National Labor Relations Board vs. American National Insurance Company, 343 U. S. 395, 96 L. Ed. 1027, 73 S. Ct. 824.

Turning now to an analysis of the meaning and implication of what the Board seeks, it is to be seen that there is apparently no limit to the financial information which a Union could require of an employer under the Board's contentions. The complaint in this case alleges that the Respondent violated the Act in that it failed to furnish to the Union its "books, records, statistics, manufacturing costs, dividend records, financial data and other information." As has been hereinabove noted, the Union's written demand upon the Company was that the Union be furnished or given access to "full and complete information with respect to (the Company's) financial standing and profits," including "evidence as to dividends paid by the Company during the past ten years and the breakdown of its manufacturing costs" (B. A. 5-6).

At the hearing before the Board's Trial Examiner, upon the Board's chief witness being questioned on this issue, he testified (50):

" . . . If it took the complete records, profits, dividends, manufacturing costs, or what have you, anything, relating to the Company's inability to grant

more money, then I think it should have been made available to (the Union's) Accountant that was to examine the books."

Similarly, the Board contends that the Respondent "was required to grant the Union's request for 'full and complete information and evidence of (the Company's) financial status' " (Board's brief in the Court below, p 11). The Board further declared that the Union was entitled to an examination of the Company's "profit, costs and other financial data" (Board's brief in the Court below, p. 13), and to a "financial report as to (the Company's) 'profit in regard to sales and costs,' its capitalization, and its cost and price structure upon which its competitive bidding was computed" (Board's brief in the Court below, p. 11).

In the light of all these specifications in the complaint, in the Union's demand upon the Respondent, in the testimony of the Board's witnesses and in the Board's brief in the Court below, no other conclusion is possible than that the ruling of the Board has no identifiable limits and that the general words of the Board's order "statistical and other information" encompass "full and complete information and evidence" derived from the Company's "complete records" as to its "financial standing," "its capitalization," its "sales," "its costs," its "manufacturing costs," "its cost and price structure," its "profits" and its "dividends."

The Respondent submits that if it should now be held that a wage demand creates an automatic legal right to all

such information as this, no matter in what good faith an employer otherwise bargains and acts, it would indeed be with general consternation that employers the country over would learn that such is the law. It has not heretofore been supposed that upon an employer refusing a wage increase to employees, he must disclose how much money he has in the bank, and what and where are all his assets and his liabilities, his revenues and expenditures, his profits and his losses.

Nor is the matter simply one of interest in privacy as a matter of principle. For example, to thousands of companies in keen competition throughout the land the privacy of manufacturing cost data is a highly valuable and guarded asset. Compulsorily to remove such privacy is to destroy this asset. If it were the law that such could be accomplished merely by the making of a wage demand, as the Board now contends, many wage demands would be made for no other purpose whatever than to obtain all the information which the Board says must then be disclosed.

Likewise, in the case of genuine wage demands, information such as is here at issue would often be requested with no purpose in mind save that of pressure upon the employer, that is, that the employer might grant the wage demand rather than make public its confidential financial data. As Chief Judge Parker in the opinion of the Court below says, "demand for examination of books could be used as a club to force employers to agree to an unjustified

wage rate rather than disclose their financial condition with such confidential matters as manufacturing costs" (Petition p. 24).

It is submitted that the Board's *fiat* in this case was indeed a giant stride toward the economic transformation of the Nation and that the Court below was right in refusing to place its seal of approval upon such a decree.

The Board in its Petition (p. 10) points out that "wage demands constitute one of the most frequent issues that arise in bargaining." And, says the Board (Petition p. 11), when the employer is confronted with a wage demand, he "shuts off further bargaining" unless he furnishes the Union with such information as is here in question. A conclusive answer to this assertion is to be found in the plain fact that for some twenty years there has been very effective bargaining under the Act with respect to wage demands, resulting in thousands upon thousands of agreements and contracts, without employers having been legally required to furnish the sort of information which is here under consideration.

Upon further analysis of the Board's ruling, it is to be seen that in still further respects it is untenable. The Board's order directs the Respondent to furnish such information "as will substantiate the Respondent's position" (B. A. 65).

Immediately the questions arise: What is meant by "substantiate," and to whose satisfaction must the Re-

spondent's "position" be substantiated, and what is the consequence if the information furnished fails to "substantiate?"

The Respondent's "position" was that it would agree to a 2½c an hour wage increase but would not agree to a 10c an hour increase. To "substantiate" this position must the Respondent *prove* that it *ought* not to be required to increase wages more than 2½c per hour? Certainly the Respondent is not to be required to prove this to the satisfaction of the Union. The only alternative then would be that the Respondent must so "prove" to the satisfaction of the Board and the Courts. But until now it has never been contemplated that the National Labor Relations Act empowers either Board or Courts to sit in judgment on any issue as to whether an employer should grant a certain wage increase or any wage increase.

The nearest the Board comes to grappling with this dilemma is to declare that the Respondent must furnish data which will show whether its position was "reached in good faith" (Board's brief in the Court below, p. 13). Such statement, however, contributes neither solution nor clarification to the matter. Let us assume that "full and complete information" from the Respondent's books and records would show that the Respondent had large cash funds lying idle in the banks. Could the Board and the Courts thereupon adjudge that the Respondent was in bad faith in refusing to agree to a 10c an hour wage in-

crease? Any such adjudication would obviously be forbidden by the explicit statutory provision that no one may be held to be in bad faith, or to have failed to bargain in good faith, because of his refusing to agree to a proposal or make a concession—to say nothing of the general proposition that the Respondent would be entitled to its own opinion, and to adhere to its own opinion, as to what funds would or would not be needed in the operation of its business.

Even if it were within the province of the Board or the Courts to adjudge that the Respondent's information proved that its position of refusing the 10c increase had not been "reached in good faith," still such a determination would lead nowhere. Neither the Board nor the Courts could thereupon order the Respondent to change its position and grant the requested increase. Nor would a directive that the Respondent proceed to bargain again, and this time "in good faith," have any legal import whatever. For under the Act the Respondent could never be required, nor properly ordered by the Board or the Courts, to abandon its position in the matter and grant a 10c wage increase or any increase beyond what it had offered.

From all of which it is abundantly clear that with this case the Board is inviting the Court to follow it into a legalistic quagmire in which no logical footing is to be found anywhere. It is submitted that the Court below

rightly declined to accompany the Board on any such expedition.

The Board does not contend that any Court has made such a ruling as it seeks from this Court, save only the Court of Appeals for the Second Circuit in the case of *National Labor Relations Board vs. Jacobs Manufacturing Company*, 196 F2d 680. Upon study of the *Jacobs* case, however, it will be seen that the question here at issue was only incidentally dealt with in that case. Language in the *Jacobs* case which the Board now relies on would seem to have been *obiter dictum*, the Court in that case having upheld the Board's finding that the Respondent there had failed to bargain essentially in that such Respondent "took the position that discussion of wage increases would be futile" and "refused to discuss the other subjects at all" or to attend "further" bargaining meetings. *National Labor Relations Board vs. Jacobs Manufacturing Company*, 196 F2d 680, 683 (C. A. 2).

Indeed the petition before this Court concedes (Petition p. 8) that the employer in the Jacobs case "had refused to discuss pension plans with the Union" and that thereby completely sufficient grounds for a Court decree supporting a finding of violation of "Section 8 (a) (5) of the Act" had been established, apart from any issue of refusal to furnish information.

It is submitted that upon a factual situation such as exists here no Court has ruled as the Petitioner now seeks

to have this Court rule. It is respectfully submitted that the able Court below was right in refusing to make such a ruling upon the facts of the present case and that its considered judgment in the matter should not be disturbed.

Conclusion

Upon the facts hereinabove outlined and for the reasons herein set forth, the Respondent prays that the petition for writ of certiorari be denied.

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PIERCE AND BLAKENEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 486

NATIONAL LABOR RELATIONS BOARD

Petitioner

vs.

TRUITT MANUFACTURING COMPANY

Respondent

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Question Presented

In negotiating upon a demand for a wage increase, if an employer bargains in good faith, is he nevertheless, *as a matter of law*, in violation of the National Labor Relations Act because he refuses to open his financial records to the Union representing his employees?

Expressed otherwise and in the terms of this case, the question is:—Though it is not questioned that the employer here bargained "with an open and fair mind" and "with a sincere desire to reach an agreement," should this Court nevertheless overrule the Court below and hold that the employer violated the law because it refused to furnish the Union with "full and complete information" as to its "capitalization," its "sales," "its costs," its "manufacturing costs," "its cost and price structure upon which its competitive bidding was computed," its "profits," "its profit in regard to sales and costs," its "dividends" and its "financial standing"?

Summary of Argument

The issue presented by this case arose out of a wage negotiation between the Respondent and a Union representing the Respondent's employees. It is undisputed that throughout such negotiation the Respondent bargained "with an open and fair mind and a sincere purpose to find a basis of agreement."

Nevertheless, the National Labor Relations Board asks this Court to rule that the Respondent "refused to bargain" with the Union, in that, and solely in that, the Respondent declined to furnish its financial records to the Union during the negotiation. The Board's contention is that in a wage negotiation, no matter that an employer otherwise bargains in complete good faith, it is automatically and *per se* a refusal to bargain, and therefore

a violation of the National Labor Relations Act, for the employer to refuse the Union access to its books and records.

There is, however, no authority of law or logic for such contention. Once it is established, as it admittedly is here, that an employer is negotiating in genuine and bona fide effort to reach agreement, then it may not be held that he is in violation of the law because he refuses to agree to any particular proposal or request. Not only have the Courts always so held in construing and applying the original bargaining requirement of the National Labor Relations Act[1] but the 1947 Amendments of the Act explicitly enunicate this proposition.[2]

After developing these fundamental features of the case the argument of this brief turns to discussion of the scope and implication of the ruling which the Board is asking the Court to approve. It is shown that such ruling encompasses virtually all of the financial and business records of the employer, yet is a ruling compelling disclosure simply for disclosures sake, without leading to any ultimately enforcible result or consequence.

Finally, the arguments advanced by the Board are analyzed to demonstrate that the position of the Board is completely lacking in any sound support, either of reason or authority.

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[1] 29 U. S. C. 158 (a) (5).

[2] 29 U. S. C. 158 (d).

Argument

Preliminary Statement

The question here at issue is one of far-reaching importance. The case is, moreover, one of first impression. No court has yet made the ruling which the National Labor Relations Board now asks this Court to make.

With this case the Board asks this Court to place the seal of law upon the long-sought aim of labor Unions "to look at the books" of American industry. The Board here asks the Court to hold that when a Union representative demands the financial records of an employer, he speaks with the voice of authority and his demand must, *as a matter of law*, be obeyed—good faith bargaining on the part of the employer notwithstanding.

The Respondent respectfully submits that the Court should make no such declaration of law. As was well expressed by Chief Judge Parker in rendering the unanimous opinion of the Court below:

> "We feel sure that it was never intended that the employer be required to disclose such information to its employees as an incident of collective bargaining; and we feel equally sure that Congress never would have passed a statute which it thought could have been given such interpretation."
>
> *National Labor Relations Board vs. Truitt Manufacturing Company*, 224 F 2d 869, 874 (C. A. 4)

The Bargaining Between the Company and the Union

In 1951, 1952 and 1953 the Respondent negotiated and entered into three successive contracts with the International Association of Bridge, Structural and Ornamental Ironworkers of America, AFL, as representative of Respondent's employees (R. 71). In the Summer of 1953, although a contract was is effect, the Union, under a clause permitting "reopening" on wage matters only, made demand for a 10¢ an hour wage increase (R. 1, 2). Representatives of the Company and of the Union met and negotiated with respect to this matter. The Company offering a 2½¢ an hour increase (R. 2). The Union insisted upon 10¢ and called the employees out on a strike (R. 9 and Petition p. 3).

After the strike ended, the Union renewed its demand for a 10¢ an hour increase. The Company again refused but proceeded to put into effect the 2½¢ raise which it had been offering (R. 77-78).

On September 2 the Union, by letter and for the first time, requested "permission to have a certified public accountant examine (the Company's) books, records, financial data, etc. to ascertain or substantiate the Company's position" (R. 1-2). The Company wrote in reply, reviewing the considerations which had impelled it to refuse the 10¢ wage increase, and declining to grant the Union access to its "confidential financial information," saying at the same time, however, "we will be glad at any time to show you our books and records regarding the

wages we pay to our employees whom you represent, although we think you have this information already." (R. 3-4).

Thereupon the Union again wrote the Company, requesting "full and complete information with respect to (the Company's) financial standing and profits during the past few years" and "full and complete information and evidence of (the Company's) financial status to substantiate its claim, including bona fide evidence as to dividends paid by the Company during the past ten years and the breakdown of its manufacturing costs" (R. 4-6). To this the Company replied "our refusal to grant your demanded wage increase was based primarily on what such a raise would do to our competitive position in the industry in this area. The Truitt Company is willing to discuss with you at any time the problem of how our wages compare with those of our competition." The Company again declined to furnish the Union with information as to its "financial status" (R. 6-7).

The Board ruled that such refusal on the part of the Respondent was *per se* and in and of itself a violation of law regardless of whether the Respondent was otherwise bargaining in complete good faith. The Board has never made any contention that there is any fault to be found anywhere in the Respondent's attitude or conduct, save in this one respect (R. 71). Indeed, after the exchange of correspondence outlined above, the parties resumed their bargaining meetings (Transcript 20-23) and later arrived at a settlement of their wage dispute.

The consideration principally stressed by the Company during the negotiations was its fear of getting its wages out of line with those of its competitors. It is undisputed that the Company stated that it was "already paying more than (its) competitors in the area" and that it named several such competitors (R. 72).

The Union's representatives who conducted the negotiations on behalf of the Union, and who were the Board's witnesses at the hearing before the Board's Trial Examiner, testified that "the Company stood firm on its position that (it) was already paying more than (its competitors)" (R. 74-75); that the Company made "explanation there that if they gave more, then it would put them in a position where they would not be able to get jobs" (R. 74-75) and "would price (the Company) out of competitive bidding" (R. 79, 84); that the Company "gave (the Union) exact names and figures and prices of jobs that (it) had lost because (it) had been underbid" (R. 75, 79-80); and that the Union never asked for any further substantiation of the Company's contention that "it was already paying more than its competitors" (R. 74). Similarily, the Company's Vice-President testified (R. 86-87):

> "Q. And what evidence did you offer to show the Union?
>
> A. We had statements from various firms, Peden Steel, Davie Steel, Carolina Steel . . . We had type-written lists of the wage rates that each was paying

and general rough classifications . . . We had evidence to show that we were paying actually higher rates than all but one of these, the one being Carolina Steel, with which we were right on par; and I might add, needless to say, they are our chief competition."

Thus the situation was one in which the Company, having basically demonstrated its good faith in dealing with the Union, having repeatedly entered into contracts with the Union, and being on the occasion in question engaged in bargaining with respect to a wage increase, (1) offered all its wage records to the Union, (2) offered and gave a part of the requested wage increase, (3) stated that out of economic considerations it would not agree to any further increase, (4) explained that outstanding among such economic considerations was its belief that it was already paying as much or more than its competitors and that if it went further beyond them, it would price itself out of its market, and (5) furnished statistical data and details to corroborate its position that its wages were already as high or higher than its competitors and that it was being underbid by them—and refused only to give the Union "full and complete information" as to its "financial status," "dividends," "manufacturing costs" and the like.

Upon this undisputed state of facts the Board asked the Court below to rule that by the Respondent's refusal to furnish such information, the good faith bargaining, which the Respondent was otherwise admittedly engaged

in, became, *as a matter of law,* transformed into bad faith bargaining, violative of the National Labor Relations Act. The Court below having refused to make such a ruling, the Board now asks this Court to do so.

The Undisputed Facts Establish that the Company Bargained in Good Faith and was Therefore Not in Violation of the Statute

Before analyzing the extraordinary implications of the ruling which the Board seeks in this case, the Respondent would respectfully call attention to the basic standard which governs the determination of good faith bargaining.

The law which the Board claims the Respondent has violated is, of course, the National Labor Relations Act and specifically that provision of the Act which makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees."[3]

This succinct enactment has been uniformly held to require that when an employer bargains collectively with the representative of his employees, he shall bargain in good faith. In adjudging whether an employer has bargained in good faith, the guiding principle has always been that he must "enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement touching wages, hours and conditions of em-

[3] 29 U. S. C. 158 (a) (5).

ployment." *Globe Cotton Mills vs. National Labor Relations Board*, 103 F 2d 91, 94 (C. A. 5).

The test of failure to bargain is whether in the light of all the facts and circumstances established by the evidence, it is to be seen that such "open and fair mind" and "sincere purpose" to reach agreement have been lacking. In this case the Board does not question that the Respondent had such mind and purpose and made bona fide effort to reach agreement. As stated by the Court below, "there can be no question but that the Company here was bargaining in this spirit."

The Board simply contends that the single fact of Respondent's refusal to furnish its financial records to the Union *negatives all good faith otherwise established and in and of itself constitutes bad faith and violation of the statutory directive.*

It has never been the law, however, that adherence to a position taken on any given matter or a particular refusal or insistence constitutes in and of itself bad faith. If this were not sufficiently clear from the basic principle outlined above, it is certainly seen to be so when one considers the fact that the National Labor Relations Act expressly and positively provides that good faith bargaining involves no obligation "to agree to a proposal" or make "a concession."[4] Nevertheless, the Board seeks to have this Court rule, directly in the teeth of this provision, that there was, *as a matter of law,*

[4] 29 U. S. C. 158 (d).

an absolute duty on the part of the Respondent, "to agree to a proposal" and make "a concession," namely the drastic proposal and the vital concession of the Company's delivering its financial records to the Union.

In the National Labor Relations Act Congress has in effect said: We require only that the employer and the employee representative shall in good faith bargain with each other. By this we do not intend that either shall ever be compelled "to agree to a proposal" or make "a concession."

Yet the Board now desires this Court to say: Even though the Respondent has otherwise bargained in complete good faith, nevertheless by refusing to agree to the proposal and make the concession of furnishing its financial records to the Union, automatically the Respondent has violated the National Labor Relations Act.

It is submitted that the ruling which the Board seeks, instead of implementing, would reverse what was written into the Statute and, instead of fulfilling, would explicitly disobey the expressed will of Congress.

This has been heretofore clearly recognized by this Court. In a case where, as here, the Board contended that the employer's taking of a certain position in bargaining was, *per se*, and as a matter of law, violative of the Statute, this Court said:

"As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining

was retained and written into Section 8 (d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession."

"Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by Respondent was, *per se*, an unfair labor practice."

National Labor Relations Board vs. American National Insurance Company, 343 U. S. 395, 409.

The Extraordinary and Indefensible Implications of the Board's Ruling

Turning now to an analysis of the meaning and implication of what the Board seeks, it is to be seen that there is apparently no limit to the financial information which a Union could require of an employer under the Board's contentions. The complaint in this case alleges that the Respondent violated the Act in that it failed to furnish to the Union its "books, records, statistics, manufacturing costs, dividend records, financial data and other information." As has been hereinabove noted, the Union's written demand upon the Company was that the Union be furnished or given access to "full and complete information with respect to (the Company's) financial standing and profits," including "evi-

dence as to dividends paid by the Company during the past ten years and the breakdown of its manufacturing costs" (R. 5-6).

At the hearing before the Board's Trial Examiner, upon the Board's chief witness being questioned on this issue, he testified (R. 82):

> " . . . If it took the complete records, profits, dividends, manufacturing costs, or what have you, anything, relating to the Company's inability to grant more money, then I think it should have been made available to (the Union's) Accountant that was to examine the books."

Similarly, the Board contends that the Respondent "was required to grant the Union's request for 'full and complete information and evidence of (the Company's) financial status' " (Board's brief in the Court below, p. 11). The Board further declared that the Union was entitled to an examination of the Company's "profit, costs and other financial data" (Board's brief in the Court below, p. 13).

Likewise in its brief before this Court, the Board urges that the Union is entitled to "full and complete information and evidence of the Company's financial status" (Board's brief, p. 23) and to "an examination of profit, cost and other financial data in addition to wage levels" (Board's brief, p. 24) and to a disclosure by the Company of "its 'profit in regard to sales and costs,'

its capitalization, and its cost and price structure upon which its competitive bidding was computed" (Board's brief, p. 22).[5]

In the light of all these specifications in the complaint, in the Union's demand upon the Respondent, in the testimony of the Board's witnesses and in the Board's briefs in the Court below and in this Court, no other conclusion is possible than that the ruling of the Board, which it now asks this Court to approve and enforce, has no identifiable limits and that the general words of the Board's order "statistical and other information" do indeed encompass "full and complete information and evidence" derived from the Company's "complete records" as to its "capitalization," its "sales," "its costs," its "manufacturing costs," "its cost and price structure upon which its competitive bidding was computed," "its profit in regard to sales and costs," its "dividends" and its "financial standing."

The Respondent submits that if it should now be held that a wage demand creates an automatic legal right to all such information as this, no matter in what good faith an employer otherwise bargains and acts, it would indeed be with general consternation that employers the country over would learn that such is the law.

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[5] Elsewhere in its brief (p. 25) the Board ironically declares that it "of course" will not impose any "unreasonable burden" upon an employer in respect to the financial information which it will require of him.

It has not heretofore been supposed that upon an employer bargaining upon a wage increase for his employees, he must disclose how much money he has in the bank, and what and where are all his assets and his liabilities, his revenues and expenditures, his profits and his losses.

Nor is the matter simply one of interest in privacy as a matter of principle. For example, to thousands of companies in keen competition throughout the land, the privacy of manufacturing cost data is a highly valuable and guarded asset. Compulsorily to remove such privacy is to destroy this asset. If it were the law that such could be accomplished merely by the making of a wage demand, as the Board now contends, many wage demands would be made for no other purpose whatever than to obtain all the information which the Board says must then be disclosed.

Likewise, in the case of genuine wage demands, information such as is here at issue would often be requested with no purpose in mind save that of pressure upon the employer, that is, that the employer might grant the wage demand rather than make public its confidential financial data. As is observed in the opinion of the Court below, "demand for examination of books could be used as a club to force employers to agree to an unjustified wage rate rather than disclose their financial condition with such confidential matters as manufacturing costs."

It is submitted that the Board's *fiat* in this case is indeed a giant stride toward the economic transformation

of this Nation and that this Court should not place its seal of approval upon such a decree.

Upon further analysis of the Board's ruling, it is to be seen that in still further respects it is untenable. The Board's order directs the Respondent to furnish such information "as will substantiate the Respondent's position" (R. 65).

Immediately the questions arise: What is meant by "substantiate," and to whose satisfaction must the Respondent's "position" be substantiated, and what is the consequence if the information furnished fails to "substantiate?"

The Respondent's "position" was that it would agree to a 2½¢ an hour wage increase but would not agree to a 10¢ an hour increase. To "substantiate" this position must the Respondent *prove* that it *ought* not to be required to increase wages more than 2½¢ per hour? Certainly the Respondent is not to be required to prove this to the satisfaction of the Union. The only alternative then would be that the Respondent must so "prove" to the satisfaction of the Board and the Courts. But until now it has never been contemplated that the National Labor Relations Act empowers either Board or Courts to sit in judgment on any issue as to whether an employer should grant a certain wage increase or any wage increase.

Let us assume, contrary to what the record indicates, that "full and complete information" from the Respondent's books and records would show that the Respondent

had large cash funds lying idle in the banks. Could the Board and the Courts thereupon adjudge that the Respondent was in bad faith in refusing to agree to a 10¢ an hour wage increase? Any such adjudication would obviously be forbidden by the explicit statutory provision that no one may be held to be in bad faith, or to have failed to bargain in good faith, because of his refusing to agree to a proposal or make a concession—to say nothing of the general proposition that the Respondent would be entitled to its own opinion, and to adhere to its own opinion, as to what funds would or would not be needed in the operation of its business.

Even if it were within the province of the Board or the Courts to adjudge that the Respondent's information *proved* that it *could* grant a 10¢ increase, still such a determination would lead nowhere. For under the Act neither the Board nor the Courts could thereupon order the Respondent to abandon its position and grant the requested increase.

From all of which it is abundantly clear that with this case the Board is inviting the Court to follow it into a legalistic quagmire in which no logical footing is to be found anywhere. It is submitted that the Court should decline to accompany the Board on any such expedition.

Analysis of the Board's Arguments

The central theme of the Board's argument, reiterated throughout its brief, is that the circumstance which created a right on the part of the Union to look at the Company's books was the Company's statement that it was *unable* to grant the requested wage increase.

Actually, in the negotiations, as hereinabove shown, the Company stressed its fear of getting its wage structure above that of its competitors far more than it did its inability to make the increase. Apart from this, however, the Board would seem to be completely unsound in attributing crucial or catalytic significance to the employer's use of the word "unable."

It must, of course, be agreed on all sides that the Company's refusal to grant more than the 2½¢ increase was based on "economic" considerations. And it is indeed difficult to understand why the ruling on the question here at issue should be any different whether the Company took the position that because of economic considerations it was *unable* to grant the requested increase, or whether the Company took the position that because of economic considerations it was *unwilling* to grant the requested increase. In either event, the Company grounded its position on economic considerations. Nor indeed would it seem that negotiations with respect to wages would ordinarily revolve around anything other than economic considerations.

The Board's argument would seem to come to the remarkable proposition that in negotiation upon a wage increase, so long as the employer stays away from a plea of financial inability and grounds any refusal of increase upon unwillingness, for that his competitors have not granted such an increase and the like, he need not open his books to the Union—but that if during the negotiations he should make any statement that he is financially unable to grant the increase, then magical words have been spoken and forthwith, upon request, he must furnish his books and records to the Union.

Another basic tenet of the Board's argument, emphasized throughout its brief, is that in negotiation upon a wage demand, unless the employer furnishes his books and records to the Union, the Union has "to negotiate in the dark" and that this constitutes "an insurmountable barrier to successful conclusion of the bargaining" (Board's brief, pp. 9, 13, 28). The contention that there can be no "successful" bargaining unless the employer opens his books to the Union is belied by the very fact, noted above, that the parties here involved thrice arrived at mutually agreeable contracts without any such opening of the Company's books.

Such a contention is more broadly and conclusively refuted by the plain fact that for some twenty years there has been very effective bargaining under the Act with respect to wage demands, resulting in thousands upon thousands of agreements and contracts, without employers having been legally compelled to furnish their

books and records to the Unions with which they were bargaining.

As to the Board's lament that without the employer's records the Union must "negotiate in the dark," it seems not to occur to the Board that most bargaining in all realms of the economic world is "in the dark" in the sense that neither of the bargainors is usually in possession of "full and complete information" as to the financial pressures or strengths or weaknesses of the other side. The bargainor who obtains such information obviously gains a very great advantage. Surely the hand of Government should not now be laid on the scales to add, by legal compulsion, this crucial advantage to the vast power which labor Unions already have in the field of collective bargaining.[6]

Nor does it appear likely that the investiture of labor Unions with this new legal power would further "industrial peace" as the Board contends (Board's brief, pp. 9, 14). Strikes, like other positive steps by a bargainor, are undoubtedly often foregone because of risk arising out of uncertainty as to the exact strength or weakness of the other side. If there were no such risk to the Unions, factual certainty being supplied to them by legal com-

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[6] Since the Board would require the employer to disclose in detail his financial affairs in order that it may be "seen" whether or not he is "able" to grant a wage increase, would the Board also require the employees to disclose in detail their financial affairs in order that it may be "seen" whether they are "able" to get along without a wage increase?

pulsion upon the employers, they would very likely embark upon many strikes which otherwise they would refrain from undertaking.[7]

As to authority for its position, the Board does not contend that any Court has made such a ruling as it seeks from this Court, save only the Court of Appeals for the Second Circuit in the case of *National Labor Relations Board vs. Jacobs Manufacturing Company*, 196 F 2d 680. Upon study of the *Jacobs* case, however, it will be seen that the question here at issue was only incidentally dealt with in that case. Language in the *Jacobs* case which the Board now relies on would seem to have been *obiter dictum*, the Court in that case having upheld the Board's finding that the Respondent there had failed to bargain essentially in that such Respondent "took the position that discussion of wage increases would be futile" and "refused to discuss the other subjects at all" or to attend "further" bargaining meetings. *National Labor Relations Board vs. Jacobs Manufacturing Company*, 196 F 2d 680, 683 (C. A. 2).

Indeed the petition before this Court concedes (Petition p. 8) that the employer in the Jacobs case "had refused to discuss pension plans with the Union" and that thereby completely sufficient grounds for a Court

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[7] To be sure, as the Board points out (Board's brief, p. 17), employers are often entirely willing to furnish full information to the Unions respecting their financial affairs. The issue here, however, is not what they may choose to do as a matter of free collective bargaining but what they must do as a matter of law.

decree supporting a finding of violation of "Section 8 (a) (5) of the Act" had been established, apart from any issue of refusal to furnish information.

The Board refers also to the case of *National Labor Relations Board vs. Whitin Machine Works*, 217 F 2d 593 (C. A. 4), which, like the present case, was decided by the United States Court of Appeals for the Fourth Circuit. But as pointed out by that Court in the present case:

> "There is nothing in our decision in *N. L. R. B. v. Whitin Mackine Works*, 4 Cir., 217 F 2d 593 which supports the order of the Board. That case had to do with furnishing information as to wages paid the employees,[8] information which the company here offered to furnish, not with dividends, manufacturing costs or the general financial condition of the employer."
>
> *National Labor Relations Board vs. Truitt Manufacturing Company*, 224 F 2d 869, 874 (C. A. 4).

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[8] Such also were the cases of: *Aluminum Ore Co. vs. National Labor Relations Board*, 131 F 2d 485 (C. A. 7); *National Labor Relations Board vs. Yawman and Erbe Manufacturing Co.*, 187 F 2d 947 (C. A. 1); *National Labor Relations Board vs. Hekman Furniture Co.*, 207 F 2d 561 (C. A. 6); *National Labor Relations Board vs. The Item Co.*, 220 F 2d 956 (C. A. 5), certiorari denied, 350 U. S. 836; *Boston Herald Traveler Corp. vs. National Labor Relations Board*, 223 F 2d 58 (C. A. 1).

It is thus to be seen that no Court has made a definitive ruling such as the Board now asks for and the Respondent urges, for the reasons herein set forth, that this Court should not do so.

The Board, in its brief, quotes and seems to rely very considerably on various articles written by "students in the field of labor relations" (Board's brief, pp. 17-20). The Respondent, of course, does not have, nor as the Court, any means of knowing what circumstances and factors may shape the conclusions of authors and commentators in this controversial field. And it is hard to believe that the Court would give any weight whatever to "views" so expressed in any direction. Certainly the Court realizes that expertise may be but a disguise or bias and that what passes as learned discussion is often in reality sophisticated propaganda.

Upon all of the foregoing it is submitted that the contention of the Board has in truth no tenable support, either of authority, logic or right.

Conclusion

For the reasons and upon the grounds herein set forth, the Respondent urges that this Court should not make the ruling which the Board asks it to make and that the judgment of the Court below should be sustained.

Respectfully submitted,

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